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## DIARY FOR JANUARY.

1. SUN... *Circumcision.* Taxes computed from this day.
2. Mon ... Heir and devisee Sitt. com. County Court and Surrogate Ct. Term begins. Munic. Elections.
3. Thur... York and Peel Winter Assizes commence.
6. Frid.... *Epiphany.*
7. Sat. ... County Court and Surrogate Court Term ends.
8. SUN... *1st Sunday after Epiphany.*
9. Mon ... Election of Police Trustees in Police Villages.
11 Wed.... Election of School Trustees,
14. Sat. ... Tr. & Cha. of Muns. to make ret. to Br. of Audit.
15. SUN... *2nd Sunday after Epiphany.*
16. Mon ... Members of M C. (except Co's) and Tr. of P. V. to hold first meeting.
17. Tues... Heir and Devisee Sittings end.
21. Sat. ... Articles, &c., to be left with Secretary of Law. S.
22. SUN... *3rd Sunday after Epiphany.*
24. Tues... Members of County Council to hold 1st meeting.
25. Wed... *Conversion of St. Paul.*
29. SUN... *4th Sunday after Epiphany.*
31. Tues... Last day for Cities and Counties to make returns to Government. Gram. School Trust. to retire.

THE

# Upper Canada Law Journal.

JANUARY, 1865.

## TO OUR READERS.

Ten years ago the first number of the *Upper Canada Law Journal, and Municipal and Local Courts' Gazette* was published. With this number will commence the eleventh year of a publication for which even our best friends anticipated but a short life.

The result has assured us that the undertaking was based on a proper foundation. Commenced with many interests in view, and embracing subjects of value and interest to various classes, the conductors from the first hoped to make the *Law Journal* "generally useful, as well to the profession as to county officers, officers of division courts, magistrates, coroners, and municipal functionaries;" indeed it was only by such a combination that a sufficient support could have been obtained to meet the expenses of a law periodical.

At first a very large measure of support came from county and division court officers; latterly this somewhat changed, and now professional men and county and division court officers stand nearly on a par as to numbers in the subscription list. We have continued to enlarge and improve upon the original design, but with little return beyond the current expenses and abundant and flattering testimony to the value of the publication.

It has been represented to us that if the subscription were reduced one-third, the circulation would at once be doubled; but, according to the present arrangements, this would not be possible without a positive loss. We have also been made aware that clerks and bailiffs of division courts, and suitors in the remote divisions, and also magistrates and municipal officers, object to pay four dollars a-year for a publication in which so much matter for the lawyers appears, the same being of little value to them; and, on the other hand, professional men say that they are made to pay for matter devoted to the information of division court and other officers, magistrates, &c., and which they care little or nothing about. And some again contrast the price of the *Law Journal* with the newspapers; but such a comparison is most unfair, as the subscription lists of the leading journals are forty or fifty times larger than ours—and this must always be the case. With a publication confined to a particular subject, and limited to a few classes, the circulation *must* be limited. After the first thousand, the expense of printing is little beyond the cost of the paper, and herein lies the ability of journals with a large circulation to sell at a low rate.

In order to meet the views and wishes of all our supporters the conductors have decided on publishing separately *The Upper Canada Law Journal* and *The Local Courts' and Municipal Gazette* at greatly reduced prices: the former to contain the matter intended more particularly for the profession, the latter to include subjects of special importance to county and division court officers and suitors, magistrates, municipal officers, &c. In this we follow a similar plan acted on in respect to the English *Law Times* and *County Courts' Chronicle*, both which periodicals are published at the same office, a portion of the matter appearing in both.

Under the new arrangement, it is not proposed to curtail the amount of matter usually given to the profession in the *Law Journal*, whilst the matter for the other classes of our readers will be increased. The cash subscription to the *Law Journal* will be reduced to $3 yearly, and the cash subscription to the *Local Courts' Gazette* will be $2; and as a portion of the matter suited to both publications may be transferred from the former to the latter, to persons taking both publications the charge will be $4 yearly. If not paid within one month, the charge will be —for the *Law Journal*, $4; for the *Local Courts' & Municipal Gazette*, $3; for both, $5.

Both publications will be sent to our present subscribers among the profession, unless immediately after receiving the first number of each, they express a desire to subscribe for the *Law Journal* only. The *Local Courts' Gazette* only will be sent to our non-professional subscribers, unless immediately after receiving the first number, any of them express a desire to take both publications, when the back number of the *Law Journal* will be forwarded to such persons, at the reduced rate of $4 a-year.

Our early friends must see in this new arrangement proof of our appreciation of the support received, and a desire on the part of the conductors to bring their publications within the reach of all.

The *Law Journal* is now divested of all matter that cannot be called strictly professional or of professional interest, and appeals for support solely *to the profession*. The legal fraternity in Upper Canada are now of such numbers and influence, that they may well expect to have a publication peculiarly devoted to their interests; and if so entitled, they are also able to support it. To a certain extent, the profession have had such an organ in the *Upper Canada Law Journal* for ten years past; but, under the new arrangements, the *Law Journal* will be wholly and solely devoted to the assistance, information and advancing the interests of the profession generally.

The attention of practitioners is particularly directed to the number of Common Law Chamber cases that appear in each issue. These cases are reported expressly for this journal, and can be nowhere else obtained—their value is too well known to the profession, to need any further comment.

We trust that the changes that have been made will be appreciated, and that the decrease in the price, the fact that the publication is now exclusively devoted to the services of the profession, the more convenient size and shape of the volume and the complete arrangements that have been made for the future, will induce such an increase to our subscription list, as will enable us to persevere in our exertions to make the publication of benefit to the class to which we belong, and creditable to the country in which we live.

The judges of the county courts, county officials and division court officers, could with a very little effort double the number of our subscribers for the *Local Courts' Gazette*, and the *Law Journal* will now be at so low a price that not only every practitioner, but every law student should give us their support. Unless great additions be made to the subscription list, we shall sustain a loss in publishing, and the business of this year must determine whether or not it will pay to continue both publications.

Very complete arrangements have been made to carry out satisfactorily the new arrangements, and the Editors have pleasure in stating that Henry O'Brien, Esquire, one of the editors of Harrison and O'Brien's Digest, and who has for some time past been assisting, is now joined with the present Editors.

We crave the indulgence of our readers for the delay in the issue of this number. It was unavoidable, owing to the changes that have been made, but will be remedied in the future.

---

## OUR NEUTRALITY.

The right of every independent state to remain at peace, while other states are engaged in war, is undeniable.

The chief obligation which rests on the neutral nation is that of impartiality. No favor must be shown to either of the contending parties. No use for purposes of war of neutral territory should be allowed to either of them. Hostilities cannot be lawfully exercised within the territorial jurisdiction of the neutral state. Not only are all captures made by belligerent cruisers within the limits of the jurisdiction absolutely illegal, but it has been held that captures made by armed vessels stationed in a bay or river, or in the mouth of a river, or in the harbor of a neutral state, for the purpose of exercising the rights of war from this station, are also illegal. Thus when a belligerent ship, lying within neutral territory, made a capture with her boats out of neutral territory, the capture was held to be invalid; for though the hostile force employed was applied to the captured vessel lying out of the territory, yet no such use of neutral territory for purposes of war is to be permitted. (*The Two Gebroeders*, 3, C. Robinson's Admiralty Cases, 162.) No use of a neutral territory for purposes of war is to be permitted. An act of hostility is not to take its commencement on neutral ground. Many instances have occurred in which such an irregular use of a neutral

country has been warmly resented. Every government is not only justified, but bound to discourage the commencement of such a practice; for, says Sir William Scott, in the case to which we have referred, "the inconvenience to which the neutral territory will be exposed is obvious; if the respect due to it by one party is violated, it will soon provoke similar treatment from the other also, till, instead of neutral ground, it will soon become the theatre of war."

Great Britain, by the passage of the Foreign Enlistment Act and other statutes of a similar character, has done more than any other state in Europe to prevent her own citizens from taking part in foreign war. These, with our extended frontier, in the present crisis, are scarcely adequate to our wants. Our danger arises from the acts of those who abuse the right of asylum extended to them, by plotting war upon those with whom we are at peace. Men so far void of the plainest dictates of gratitude deserve not our protection.

It is clear that a state may prevent the entrance of strangers within its territory. This being so, the right to regulate their conduct while within the territory, or to drive them out of it in the event of misconduct, is equally clear. People resident within the jurisdiction of any sovereign territory are subject to its laws while receiving its protection, and a violation of the law of neutrality in times of war should be made to work a forfeiture of protection. Nay more, there should be a power to prevent violations of neutral territory, by the removal of those likely to violate it. Self preservation is the first law of nature, as it is of nations. During periods of revolutionary disturbances, both on the continent of Europe and in Great Britain, acts were passed by parliament authorizing certain high officers of state to order the departure of aliens from the realm within a specified time, and their imprisonment in the case of refusal. This is a power which, according to Canning, had undoubtedly been exercised by the Crown sometimes without the assent of parliament. (Canning's Speeches, 225.)

The first act of the kind of which we find any trace on the Statute Book is 33 Geo. III. cap. 4, passed in 1793. It was followed up by Lord Grenville's note, dismissing Monsieur Chauvelin. He was informed that the King could no longer permit his residence within the kingdom, and required him to retire from the kingdom within the term of eight days. (State Papers on War, p. 245.) The 33 Geo. III. cap. 4, was followed up by 38 Geo. III. caps. 50, 70; 41 Geo. III. cap. 24; 42 Geo. III. cap. 93; 43 Geo. III. cap. 155; 54 Geo. III. cap. 155; 55 Geo. III. cap. 54; 56 Geo. III. cap. 86; 58 Geo. III. cap. 96; 1 Geo. IV. cap. 105; 3 Geo. IV. cap. 97; 5 Geo. IV. cap. 37; and as late as 9th June, 1848, we find "An Act to authorize for one year, and to the end of next session of Parliament, the removal of aliens from the realm." (10 & 11 Vic. cap. 20.)

The latter being the most complete act of the kind of which we have any record, it may be well to advert to some of its provisions. It enacted that when and so often as one of her Majesty's principal Secretaries of State should have reason to believe, from information given to him in writing by any person subscribing his or her name and address thereto, that for the preservation of the peace and tranquility of any part of the realm, it became expedient to remove therefrom any alien or aliens, it should be lawful for such Secretary of State, by order under his hand, to be published in the *London Gazette*, to direct that any such alien or aliens should depart within a time limited in such order. It was enacted that if any alien should knowingly and wilfully refuse or neglect to pay due obedience to such order, or be found in the realm or any part of it, contrary to the order, after publication thereof, and after the expiration of the time limited in the order, it should be lawful for any of her Majesty's principal Secretaries of State, or for any Justices of the Peace, to cause every such alien to be arrested and to be committed to the common gaol of the county where he or she should be arrested, there to remain without bail or mainprize until he or she should be taken into charge for the purpose of being sent out of the realm. Besides, it was provided that every alien knowingly and wilfully refusing or neglecting to pay due obedience to any such order should be guilty of a misdemeanor, and liable to be imprisoned for any time not exceeding one month for the first offence, and not exceeding twelve months for the second or any subsequent offence. Provision was made for the conveyance of the alien out of the kingdom; but in the event of the alien alleging an excuse for not complying with the order, power was given to the Lords of the Privy Council to

judge of the sufficiency of the excuse, and to allow or disollow the same, either absolutely or on such condition as they should think fit. There were other provisions as to details, too long to be here repeated.

Some act of this kind is needed in Canada. There are men living in our midst who it is well known are here for no purpose of good. They are crafty, but their purpose and business are known. Evidence it is true cannot at present be had sufficient to lead to their conviction on a criminal charge, but there is no moral doubt of their guilt. Are we to remain inactive until these men, by some overt act, embroil us in trouble with our neighbours? As the law stands, we must do so. Were it in our power to compel their quitting Canada we should prevent mischief. Certainly prevention, in a case like this, is better than punishment. When danger stares us in the face, we are not to be influenced by mere sentimentalism. It may seem inhuman to shoot a man, but if that man be in our house at midnight for purposes of plunder we wait not to weigh feelings of sentimentality. Our feelings of pity are roused when we see the young and the profligate sentenced to imprisonment, but no one who has a duty to perform is influenced by considerations of pity in such cases. We owe a duty to ourselves. That duty is to keep peace with our neighbours, a duty which cannot faithfully be performed so long as we shelter with immunity those whose aim it is to do acts that will have a tendency to plunge us into war.

But while admitting to the fullest extent our duty to preserve neutrality, and to enforce its obligations upon those who seek our protection, we cannot concede the right of any foreign power to invade our territory, except under circumstances of paramount necessity, and then only at the peril of war. An unguarded passage in Phillimore is often cited by those whose respect for territorial inviolability is not so great as it ought to be. It is as follows: "A rebellion or civil commotion it may happen agitates a nation; while the authorities are engaged in repressing it, bands of rebels pass the frontier, shelter themselves under the protection of the conterminous state, and from thence with restored strength and fresh appliances renew their invasions upon the state from which they have escaped. The invaded state remonstrates. The remonstrance, whether from favor to the rebels or feebleness of the executive, is unheeded, or at least the evil complained of remains unredressed. In this state of things the invaded state is warranted by international law in crossing the frontier and in taking the necessary means for her safety, whether these be the capture or dispersion of the rebels or the destruction of their stronghold, as the exigencies of the case may fairly require." General Dix, acting upon the authority of this passage as he understood it, on 14th December last, promulgated an order authorizing "military commanders" on the frontier to shoot down raiders from Canada, or, if necessary, with a view to their capture, "to cross the boundary between the United States and Canada" and "to pursue them wherever they may take refuge." Before promulgating this order, assuming the passage from Phillimore to be law, General Dix also assumed either that we favored the Southern Confederacy or that our executive was too weak to prevent aggressions from our territory into that of the United States. At the time, there had only been two raids—the raiders in the one case (St. Alban's) having been discharged after deliberation by a judge having jurisdiction in the premises—and one of the raiders in the other (Lake Erie piracy) being at the time under examination by a judge having full jurisdiction over the case. These facts were wholly insufficient to warrant either the conclusion of favoritism or of weakness, and the consequence was that the government in Washington two days afterwards caused the obnoxious part of the order to be cancelled. But let us see the views which the government of the United States have already expressed through their ablest statesman, Daniel Webster, on this subject.

During the rebellion in Canada, the rebels found many sympathizers in the United States. Intelligence was received that an American vessel (the Caroline) was in United States waters, destined to aid the rebels. On the night of 29th Dec. 1837, it was said, Alexander McLeod, a Canadian subject of Her Majesty, headed a party, who in American waters seized the vessel and subsequently fired it and sent the burning vessel over the Falls of Niagara. For this he was apprehended and imprisoned at Lockport, in the United States. Great Britain demanded his surrender, on the ground that if he had any concern in the destruction of the Caroline, he had acted therein as a soldier under the order of superi-

ora, in a military expedition planned and authorized by the Government of Canada, and afterwards avowed and sanctioned by the Imperial Government. The reply was, that his military status under the circumstances could not be acknowledged, and that under any circumstances the Executive Government of the United States could not interfere with the administration of justice by the lawfully constituted tribunals of the country. McLeod afterwards obtained a writ of *habeas corpus* from the Superior Court of the State of New York, but that court would not acknowledge his military status, and refused to discharge him (25 Wendell 483). Subsequently he was, we believe, tried by a jury of the United States, proved an alibi, and acquitted. Thus ended, what at the time appeared to be, a certain cause of war.

Mr. Fox, acting for the British Government, formally demanded "the immediate release" of McLeod, and intreated the President of the United States to take into his most deliberate consideration, the serious nature of the consequences which must ensue from a rejection of the demand. Speaking of the right of invading foreign territory for the purpose of defence, Daniel Webster said, "It is admitted that a just right of self-defence attaches always to nations as well as to individuals, and is equally necessary for the preservation of both. But the extent of this right is a question to be judged by the circumstances of each particular case; and when its alleged exercise has led to the commission of hostile acts within the territory of a power at peace, nothing less than *a clear and absolute necessity*, can afford ground of justification." * * * "It will be for Her Majesty's Government to show upon what state of facts and what rules of international law the destruction of the Caroline is to be defended. It will be for that Government to show *a necessity for self-defence, instant and overwhelming, leaving no choice of means and no moment for deliberation.* It will be for it also to show that the local authorities of Canada, even supposing the necessity of the moment authorized them to enter the territories of the United States at all, did nothing unreasonable or excessive; since the act justified by the necessity of self-defence, must be limited by that necessity and kept clearly within it. It must be shown that admonition or remonstrance to those on board the Caroline, was impracticable or would have been unavailing. It must be shown that day light could not be waited for, that there could be no attempt at discrimination between the innocent and the guilty, that it would not have been enough to seize and detain the vessel, but that there was a necessity present and inevitable for attacking her in the darkness of the night while moored to the shore, and while unarmed men were asleep on board, killing some and wounding others, and then drawing her into the current above the cataract, setting her on fire, and careless to know whether there might not be in her the innocent with the guilty or the living with the dead, committing her to a fate which fills the imagination with horror. A necessity for all this the Government of the United States cannot believe to have existed."

People so sensitive to foreign aggression on their territory as our neighbours appear to have been, should be slow to authorize anything of the kind on the territory of others. It must not be left to ordinary soldiers or even to generals, to say when the necessity arises for the invasion of foreign territory. The very act is in most cases, a declaration of war. And we are at a loss to understand what right any general, be his position ever so high, has to issue general orders similar to that promulgated by General Dix, without reference to his Government, and when known only known to be revoked. Generals are no more than the servants of the governing power, and when acts affecting foreign powers are contemplated, the knowledge, if not the command of the Government, should be shown to exist. General Fremont was reprimanded for liberating slaves in a portion of territory under his command. How much more was General Dix, who presumed to authorize encroachment by armed men on a territory not only not under his command, but not subject to the rule of his Government, deserving of censure. No doubt it was done in the excitement of the moment in receipt of the intelligence of the discharge of the St. Albans' Raiders. If men high up in authority in the army, are so subject to emotion as to transgress the boundaries of duty, how dangerous would it be to leave to commanders under them and other subordinates, the power to decide in what cases it would be necessary to violate neutral territory. We trust the order of General Dix will be the last as it is the first of its kind.

Our neighbours must have confidence in us. They should not lend a ready ear to those whose aim, if not business, it is to embroil Great Britain and the United States. Let them listen to the memorable words of their great statesmen, to whom we have already referred. "That on a line of frontier, such as separates the United States from Her Britannic Majesty's North American Provinces, a line long enough to divide the whole of Europe into halves, irregularities, violences, and conflicts should sometimes occur against the will of both Governments, is certainly easy to be supposed. All that can be expected from either Government in these cases, is good faith, a sincere desire to preserve peace, and do justice, the use of all proper means of prevention, and that if offences cannot be always prevented, the offenders shall still be justly punished" (Works of Daniel Webster, vol. VI., p. 256).

These are words that ought at the present juncture, to be treasured in every heart. The discharge of the St. Albans' Raiders was a hasty act, and one which all right thinking men deplored; but it was not the act of the Government. It was the act of a judge in the conscientious discharge of his duty, however erroneous may have been his view either of the law or the facts. The Government, instead of adopting it at once, as they might in good faith have done, repudiated it and in good earnest set about the re-arrest of the raiders. The result has been the capture of several of them, and not only this, but the Government has appointed stipendiary magistrates and at great expense sent armed forces to the frontier, for the sole purpose of preventing lawless bands annoying our neighbours from our territories. Burley, the Lake Erie pirate, has been committed by the Recorder of Toronto for extradition under the Ashburton treaty. This decision has since been sustained by four judges of the Superior Courts of law, including two Chief Justices, the most eminent lawyers in Upper Canada. Everything that can be done, has been done or is being done, to demonstrate to the world that we are alive to what is due to our neighbours, with whom we have so long been at peace and with whom we desire so to continue for all time to come. Still more, this action of our Government receives the hearty support of the entire body of our people, who are influenced not merely by motives of self-interest, but of impartiality and right as between the contending parties across the lines.

## EXTRADITION TREATY.

Our readers will find in this number two decisions of great importance under the extradition clause of the Ashburton treaty. The one a decision of Mr. Justice Hagarty (*In re Warner*, p. 16,) and the other a decision of Mr. Recorder Duggan, (*In re Burley*, p. 20). The latter has since been sustained by four of the judges of the Superior Courts of Common Law on an application for the prisoner's discharge under a writ of *habeas corpus*. We shall publish the judgments of the Superior Courts Judges in our next issue.

## JUDGMENTS.

### *QUEEN'S BENCH.*

Present: Draper, C. J.; Hagarty, J.; Morrison, J.

Monday, December 19, 1864.

*Elmore* v. *Hind.*—Judgment for defendant to 2nd plea to 1st count; and judgment for plaintiff on demurrer to 2nd plea to 4th count; with leave to defendant to apply to amend.

*Dennison* v. *Knox.*—Appeal from the decision of the judge of the county court of Huron and Bruce allowed. Judgment for plaintiff in the court below, on demurrer to plaintiff's replication.

*Swales* v. *Sinclair.*—Appeal from the decision of the judge of the county court of Middlesex dismissed with costs.

*Leach* v. *Dennis.*—Judgment for demandant on demurrer to pleas.

*McKinstry* v. *Furby.*—Appeal from the decision of the county court of Northumberland and Durham dismissed with costs.

*Leith* v. *Freeland.*—Judgment for plaintiff, on demurrer to equitable plea of defendant.

*Kerr et al.* v. *Chapman.*—Rule *nisi* for new trial discharged.

*Watson* v. *Northern Railway Co. of Canada.*—Rule absolute for new trial on payment of costs.

*Brothers* v. *Harris.*—Rule absolute for new trial. Costs to abide the event.

*Young* v *Elliot.*—Rule absolute for new trial without costs.

*Riddell* v. *Brown.*—Rule discharged.

*Bletcher* v. *Burn.*—Rule absolute for new trial without costs.

*Bletcher* v. *Marsh.*—Same facts: same decision.

*Bank of Montreal* v. *Scott.*—Rule for new trial without costs, unless plaintiff consent to the entry of a *stet processus* on the first count.

*McDonell et al.* v. *McDonald.*—Rule absolute to enter verdict for plaintiffs.

*Cox* v. *Jones.*—Rule discharged.

*Sullivan* v. *King.*—Rule absolute to reduce verdict by $30. discharged as the rest; and as each party fails on a material part of the rule, no costs to either party.

*Young* v. *O'Reilly.*—Rule absolute for new trial, upon payment of costs, and bringing amount of verdict into court within six weeks, otherwise rule discharged.

*Snarr* v. *Waddell, Sheriff, &c.*—Rule discharged.

*Rayson* v. *Graham.*—Judgment for plaintiff on demurrer to plea of defendant.

*Graham* v. *Southwick.*—Appeal from the County Court of Middlesex, dismissed.

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Saturday, December 24, 1864.

*Keating* v. *Cassels.*—To be re-argued.

*Great Western Railway Co.* v. *The Grand Trunk Railway Co.*—Judgment for defendants, on demurrer to their plea to plaintiff's declaration.

*Fairman* v. *White.*—Rule absolute to rescind judge's order, and to set aside judgment and all proceedings had thereunder, without costs.

*In re McDermott and the Buffalo and Lake Huron Railway Co.*—Rule absolute to rescind judge's order without costs.

*In re Secord and the Corporation of the county of Lincoln* —Rule discharged with costs.

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## *COMMON PLEAS.*

Present: Richards, C. J.; Adam Wilson, J.; John Wilson, J.

Monday, December 19, 1864.

*Mathewson* v. *Henderson.*—Rule absolute for a new trial. Costs to abide the event.

*Betts* v. *Farewell.*—Rule *nisi* for new trial as to interest.

*Oke* v. *Cowan.*—Rule *nisi* refused.

*McLaughlan* v. *McLaughlan.*—Rule *nisi* granted.

*Strowger* v. *Frank.*—Rule *nisi* refused.

*Corporation of Thurlow* v. *Bogart.*—Judgment for plaintiff on demurrer. Leave to defendant to apply to judge in chambers to amend within a month.

*Wilson* v. *Keys.*—Judgment for plaintiff on demurrer to plea, and for defendant on demurrer to new assignment bad.

*Canada Permanent Building Society* v. *Mitchell.*—Rule absolute for new trial.

*Campbell* v. *Baxter.*—Judgment for plaintiff on demurrer to ninth plea of defendant.

*Rayson* v. *Graham.*—Judgment for defendant on demurrer.

*Crooks* v. *Dickson.*—Judgment for plaintiff on demurrer to plea.

*Soules* v. *Donovan.*—Rule discharged.

*Thorne* v. *Corporation of Mara and Rama.*—Rule absolute to enter nonsuit.

*The Queen* v. *McPherson.*—Judgment for the Crown. Leave to amend refused.

*The Queen* v. *Parker.*—Conviction affirmed, and judgment to be given thereon at next sittings of oyer and terminer for the counties of Huron and Bruce.

*Crawford* v. *Bostwick* —Postea to defendant.

*Bank of Montreal* v. *Taylor.*—*Held*, that a *fi. fa.*, tested 16th May, 1861, renewed on 16th May, 1862, was too late, and so had expired. Rule absolute for entry of judgment for net proceeds of amount in dispute, without interest, viz., $3,894 70.

*Miller* v. *Beaver Mutual Insurance Co.* — Rule for revision of taxation discharged with costs.

*Brown* v. *Gossage.* — Rule discharged with costs to the plaintiff.

*Hall* v. *Goslee.*—Rule discharged with costs.

*In re MacGregor.*—Rule absolute to discharge applicant from his articles of clerkship.

*In re Munsie* v. *McKinley.*—*Held* that a judge of a division court may, in an interpleader matter, adjudicate, although title to land be brought in question. *Held*, also, that the judge should, in such cases, adjudicate without the aid of a jury. Rule discharged without costs.

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Saturday, December 24, 1864.

*Pearson* v. *Ruttan.*—Rule absolute to enter nonsuit. Leave to appeal granted.

*Gottwalls* v. *Mulholland.*—Rule discharged. J. Wilson, J., *dissentiente*, on some points. Leave to appeal granted.

*Campbell* v. *Kempt.*—Judgment for plaintiff on demurrer. Leave to defendant to withdraw demurrer, rejoin issuably, on payment of costs in ten days.

*Boulter* v. *Hamilton.*—Rule discharged.

*Reid* v. *Reid.*—Stands.

*The Queen* v. *McIlroy.*—Rule for new trial discharged.

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# SELECTIONS.

## THE CHIEF JUSTICE OF THE UNITED STATES.

Salmon Portland Chase, now Chief Justice of the United States, was born in Cornish, New Hampshire, January 13, 1808. His father having died, he was sent, at the age of twelve, to Ohio, and placed under the care of his uncle, Bishop Chase. After studying for a year at Cincinnati College, he entered Dartmouth College in New Hampshire, from which he graduated in 1829. He went to Washington, where he opened a school, at the same time studying law under the direction of William Wirt. Having been admitted to the bar, he went to Cincinnati, and entered upon the practice of his profession. To this, for some years, he applied himself exclusively, taking no prominent part in politics, although he belonged to the Democratic party. In 1841 he first took a decided part in politics. He was then a member of the Convention of those opposed to the further extension of slavery, and was the author of the Address unanimously adopted by that body. He took a prominent part in all the subsequent movements having this end in view, and was President of the Free Soil Democratic Convention at Buffalo in 1848. The Democratic party in Ohio had at this time assumed the p sition of hostility to slavery in the Territories. Mr. Chase was chosen United States Senator in February, 1849, receiving the votes of all the Democratic members of the Legislature, together with those of others who were in favor of free soil. Though elected as a Democrat, he declared that if the party withdrew

from its position in regard to slavery he should withdraw from it. This he did formally in consequence of the section of the Democratic Convention held at Baltimore in 1852. When the Republican party was organized Mr. Chase took the position of one of its acknowledged leaders. Soon after the close of his Senatorial term in 1855, he was elected Governor of Ohio. He was re-elected, his second term closing in 1860. He had in the mean time been again elected to the Senate of the United States, and had he taken his place would undoubtedly have been the leader in that body. But he resigned his seat in order to accept the position of Secretary of the Treasury—a position for which he was especially pointed out by the success of his financial policy while Governor of Ohio. Some difference of view between himself and leading members of Congress, led, on the 30th June 1864, to his resignation of this post: since when he had not held office, but has been frequently named by the Bar and country as a probable successor of Taney, C. J. in case of the demise of that aged magistrate. Mr. Chase, who thinks clearly, and writes well, enters upon the duties of his high office at the age of fifty-six, with a sound legal reputation, and with a physical vigor which gives reason to hope that he may be able to perform its duties for a period as long as that of his predecessor.—*Legal Intelligencer.*

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## ODDS AND ENDS.—CLAYTON'S REPORTS.

I am not conscious that Clayton's Reports—though declared on their face to have been useful for leaders at the Assizes in those times when Puritans, being uppermost, hung Cavaliers, and when Cavaliers, coming back in turn to power, repaid this favor to their Presbyterian friends—are of much practical use, in this day, to any one. The lovers of quaint records, however, may still enjoy them for other merits. A few examples may serve. Sheffield's case gives high ideas of constabularity greatness. Dogberry would have rejoiced in it. Thus it reads:

"An action of false imprisonment brought against a constable, who pleaded not guilty. The defendant did show in evidence, that he came to search in time of the plague for lodgers in the town, and he found a stranger and questioned him which way he came into the town; who answered, 'over the bridge.' And the Judge conceived this to be a scornful answer to an officer. And because he had no pass, but travelled without one, and gave such an answer, the defendant did offer to apprehend him; and the plaintiff thereupon being present said to the defendant, 'he shall not go to prison,' but yet offered to pass his word for his forthcoming; upon which the defendant did commit the plaintiff, and it was ruled upon evidence, there was good cause to commit the plaintiff for opposing the constable, though but verbally, in his office, who is so ancient an officer of the commonwealth!"

Usley's case records an interesting fact in the history of—turkeys. Thus it runs:

"Trespass. Plaintiff declares that the defendant did break his close, and eat his grass, &c., *cum averiis suis, scilicet*, oxen, sheep, hogs, *avibus, anglicé*, 'turkeys.' And the Judge in this case did not hold that turkeys are not comprised within the general word *averia*, which is an old-law word, and these fowls came but lately into England. And upon this it was directed to cover the damages, for otherwise, if the damages shall be jointly given, and it be ill for this of the turkeys, for the reason above said, it will overthrow all the verdict."

Judges, too, it appears, were as decided in that day as they have ever been in ours: though they sometimes hastened, it would seem in such a way as may have recalled Sir Nicholas Bacon's counsel. "Stay a little that we may the better speed." *Lee* v. *Saville* is the illustration.

"The Judge did put back the jury twice because they offered their verdict contrary to their evidence, as he held, and set a hundred pound fine upon one of the jury, who had departed from his companions; but after, upon his examination, it was taken off again, for that it did appear, it was only by reason of the crowd, and some of his fellows were always with him."

Attorneys, also, seem to have had great ideas of their dignity when walking in the Market-place; and to have been, perhaps, susceptible over much of its infringment. Certainly those gentlemen of the ancient English Bar ought, when they went into such places for a promenade, to have been content with neighbors' fare. Clayton the Reporter, seems to have rather been of this opinion, too. The case is given by him thus:

"Kerifford, an attorney, was plaintiff in battery, and the case was thus: He was walking in the market (as attorneys do too much), and the defendant and he had some angry words there; upon which the defendant did press to go by him; and in going, by reason of the throng of people there, he jostled the plaintiff, and for this he brought this action, in which, if an assault only be proved, it is sufficient. And holden it was no assault, for the touching him or jostle was to another end, namely, to get by in the throng, and not to beat him," &c.

The next case is a sad one, a melancholy warning to all persons who strive for the mastery in litigation. Attend to it all such!

"Memorandum. One Mr. Guye Faux, of the parish of Leathly, a cavalier, had a cause heard about a plunder, upon Monday this week after dinner, and was well in Court and damage against him a hundred pounds, and he was found dead next morning upon the conceit of it, as was supposed."—*N. Y. Transcript.*

# UPPER CANADA REPORTS.

## QUEEN'S BENCH.

(*Reported by* Chris. Robinson Esq., Q.C., *Reporter to the Court.*)

### In the Matter of Davidson, Sheriff of, and Miller, Chairman of the Quarter Sessions for the County of Waterloo.

*Jury Act, Consol. Stat. U. C., ch. 31—Sheriff's fees—Mandamus—Demand and refusal—Quarter Sessions—Order on treasurer, how to be drawn.*

Where the sheriff travels to summon grand and petit jurors at the same time, and serves both during the same journey, he is not entitled (under Consol. Stat. ch. 31,) to charge separate mileage on each set of summonses, but only for the number of miles actually travelled in order to serve all the jurors.

He is entitled, under sec. 161, sub-sec. 3, besides his mileage, to $12 for summoning the 48 petit jurors for the County County, and the same sum for the Quarter Sessions, though the same jurors are summoned for both courts, and served at the same time with both summonses.

On application for a mandamus to the chairman of the Quarter Sessions to sign an order on the treasurer for payment of the sheriff's account which had been audited and passed, the chairman stated in his affidavit filed on shewing cause, that he declined to mark the account as audited and passed, and said that he would not sign a check therefor. *Held*, that this removed all objection to the proof of a demand and refusal.

*Semble*, that such a mandamus could not properly be granted, for, 1, it is not essential that an order of the Quarter Sessions should be signed by the chairman; and, 2, he has no right to draw orders on the treasurer except when presiding in court, and then it is an order of the court, not of the presiding justice.

[Q. B., M. T., 1864.]

In Easter Term last *Robert A. Harrison* obtained a rule calling on Mr. Miller, chairman, &c., to shew cause why a rule or order of this court should not issue, directing him to sign an order for the sum of $148 60, being the amount of an account of the said sheriff audited and passed by the court of Quarter Sessions in March last; or why a writ of mandamus should not issue commanding the said chairman to sign such order; and why such order as to the costs of this application, and of subsequent proceedings, should not be made as to this court might seem meet.

By the affidavits filed on both sides, it appeared that the sheriff's account, amounting to $148 60, was presented on the 10th of March, 1864, to the Court of Quarter Sessions for the County of Warterloo, and the majority of justices present audited and passed the same, there being a difference of opinion as to two items, which were submitted to vote.

It seemed to be the practice, when an account had been audited and passed, for the chairman of the Quarter Sessions to mark it accordingly, and for the chairman also to sign a check or order upon the treasurer to pay the amount. The chairman stated in his affidavit that he declined to mark and indorse this account as audited and passed, and stated that he could not sign a check for the amount, though he was willing to sign one for the same less two items to which he objected as not warranted by law.

A check was however presented to the chairman for his signature in the following form:

"Quarter Sessions, Berlin, March 10th, 1864. Pay to the order of George Davidson, Esq., Sheriff, one hundred and forty-eight 60-100 dollars.

"To the treasurer County of Waterloo.

"Chairman."

The principal matter in dispute, and on which the refusal of the chairman was mainly grounded, was the right of the sheriff to charge separate mileage for travelling to serve grand jurors and petit jurors, when he travelled to serve both sets of summonses at one and the same time, and the two were served in the course of the same journey. There was a separate precept for summoning grand and petit jurors.

The other item to the allowance of which the chairman objected, arose out of these facts:—The sheriff has a right to charge a sum of $12 for summoning the panel of 48 petit jurors, exclusive of his mileage (Consol. Stat. U. C., ch. 31, sec. 161, sub-sec. 3). He summons the same forty-eight persons to serve as petit jurors for the Court of Quarter Sessions and for the County Court, both courts opening at the same place and on the same day, and both being almost always presided over by the same individual, the judge of the County Court. There are separate summonses served on each juror for each court, though in practice served at the same time. The jurisdiction of one court is criminal, and of the other civil. Though held in the same court room and at the same time, they are as distinct as the courts of *Nisi Prius* are from those of *Oyer* and *Terminer* and General Gaol Delivery. The judge sits alone in the exercise of his civil jurisdiction, but he must have at least one other justice of the peace to sit with him in the Court of Quarter Sessions, and for the passing and audit of accounts he must have six to sit with him. The sheriff charged $12 for summoning 48 petit jurors for the Quarter Sessions and the same sum for summoning 48 jurors for the County Court.

*S. Richards*, Q C., shewed cause, citing "The Upper Canada Jurors' Act," Consol. Stats. U. C. ch. 31, secs. 59, 69, 145, 161, 164; ch. 119, sec. 7; ch. 121, secs. 3, 4; *The Corporation of Haldimand* v. *Martin*, 19 U.C Q.B. 182; *In re Keenahan and Preston*, 21 U. C. Q. B. 461; *Davidson and the Quarter Sessions of Waterloo*, 22 U. C. Q. B. 405; *Regina* v *Conyers*, 8 Q B. 999; *Rex* v. *Robinson*, 2 Smith, 274; *Regina* v. *Justices of Middlesex*, 12 L. J. N. S. 36, M. C.; *In re Hamilton, Sheriff*, v. *Harris*, 1 U. C. Q. B. 518.

*M. C. Cameron*, Q C., and *Harrison* supported the rule, citing *Regina* v. *Law*, 7 E. & B., 366; *The Queen* v. *The Board of Police of Niagara*, 4 U. C. Q. B. 141; *Ex parte Bird*, 5 Jur. N. S. 1009.

Draper, C. J.—It has been urged against this rule, first, that no sufficient demand is shewn to have been made upon the chairman to sign the check or order in question, so as to give the sheriff a right to claim the writ of mandamus. And, second, that the law does not impose a duty on the chairman of the Quarter Sessions to sign a check for the payment of money by the treasurer of the county, or at all events not such a check as is set forth in this case, which is on the face of it a mere negotiable draft at sight.

Independently of these objections, the case has been argued on both sides on the right of the sheriff to be paid both or either of the sums in

dispute, and it is in my opinion better to express such conclusion as we have arrived at on the substantial matter in dispute, whatever view we may take of the preliminary difficulties.

After examining the clauses of the statutes to which reference has been made, and after carefully considering the opinions expressed in the case of *The Corporation of Haldimand* v. *Martin*, (19 U. C. Q. B. 182), I am of opinion that notwithstanding that there are two precepts, the one directing the sheriff to summon a grand and the other a petit jury, yet the plain intent of the statute is, that for summoning *all* the jurors required for any particular court the officer summoning shall only be entitled to mileage for the number of miles actually travelled. The officer is to be paid out of public funds a sum per mile which has been settled to be a proper allowance for mere travel. Mileage must mean this, and I do not see that it can mean more. For summoning jurors, the allowance is carefully limited by the statute to travel necessarily performed in going to effect the service of such summonses, and in the language of Sir J. Robinson, (19 U. C. Q. B., p. 183) "All that any of the statutes had given was 6d. a mile for the distance necessarily travelled from the county town to make all the services. It was never allowed, I think, to charge from the county town to the residence of each juror, as if the sheriff had made a new start from the county town to go to the residence of each person, though eight or ten jurors might be living near each other in a township thirty miles from the court."

It does not appear to me that the principle is inapplicable because the officer is travelling to serve summonses on twenty-four grand jurors at the same time that he is travelling to serve forty-eight petit jurors, all of whom are to attend at the same time and place for the transaction of business in the same court. When the service is completed he has a right to remuneration for every mile actually and necessarily travelled, but I fail to see why he should, after travelling ten miles and then serving a summons on a grand and another on a petit juror, be allowed to claim for travelling twenty miles; and this is the result of the contention.

The allowance for summoning the forty-eight petit jurors for the Quarter Sessions and County Court appears to me to rest on a different footing, and for the reasons given by Sir J. B. Robinson in the same case in support of allowing two panels of jurors, one for each of these courts. First, the legislature has allowed one panel for each court; next, the offices of the two courts are different, "and in order to make the panels conveniently accessible to suitors, it probably is expedient that there should be one in the office of each court." Then it appears very clear to me that without the legislature had so provided, a summons to attend as a juror at the court of Quarter Sessions would not be a summons to attend at the county court, nor would it subject a person so summoned to be fined for non-attendance at the latter court. As I understand, the jurors are distinctly summoned for each court, and a separate return of the jurors summoned is made to the precept issued by each court, and if required the sheriff must be prepared to shew that each juror was summoned to attend whichever court it may be in which such juror's attendance may happen to be required. It thus becomes, in my opinion, a distinct service, and may be charged for accordingly.

This expression of opinion will, I hope, put an end to the present difficulty.

Then as to the objection that there has been no sufficient demand shewn, the second paragraph of the chairman's affidavit in my opinion puts an end to it. He states that he declined to mark and indorse the sheriff's account, as "audited and passed," and stated that he would not "sign a check therefor." After this, the want of proof of a sufficient demand ought not to be set up. I am quite prepared to overrule the objection.

My present leaning is in favor of the other objection, first, because it does not appear to me necessary for the validity of an order of the court of Quarter Sessions that its orders should be signed by the chairman; and, second, because as a mere check or order of the chairman himself, he has not, that I am aware, any right to draw checks or orders upon the treasurer of the county unless when sitting in court, and as presiding in court; and then the instrument is an order of the court itself, and not an order of the presiding justice.

The auditing and passing of the accounts is the act of the court itself. The endorsing a memorandum of such auditing and passing is no more than an authentication for the guidance of the clerk of the peace in entering the account and its audit in the record of the proceedings, and for drawing up an order of court, when such order is signified, that the treasurer do pay such an account. It seems to me analogous to the granting a rule *nisi* or absolute by any court of record. The court grant or refuse, discharge or make absolute, the rule asked for. The clerk makes the entry in his book, and issues the rule so ordered to the party entitled to it. The judge presiding signs nothing. But for the words in the 3rd section section of chapter 121, Consol. Stat. U. C., I should have felt no doubt, and I am not disposed to construe them as meaning to enact that no order of the court of Quarter Sessions for the payment of money shall be obeyed unless a check or order for the payment of the sum be drawn and signed by the chairman. I should rather hold that the effect of this section is, that where the court of Quarter Sessions have established a practice for their own convenience, that a check or order must be signed by their chairman before an account approved and ordered by the court to be paid shall be liquidated by the treasurer, it must express the act of parliament by which the expenditure is sanctioned. I certainly do not think it was the intention of the legislature that after the court of Quarter Sessions have made a formal order, though erroneous or even illegal, the chairman of that court should have power or authority to delay the execution of or to nullify such order, by withholding his signature. The superior courts can quash an order of Sessions for the payment or appropriation of money, (*Rex* v. *Justices of Newcastle*, Dra. Rep 204.) and such a mode of proceeding is a more satisfactory mode of disposing of such a question as the present.

* * * * *

(The learned Chief Justice here expressed his

strong disapprobation of the introduction in the affidavits of the parties of remarks impugning each other's motives and conduct.)

Both parties were wrong in suffering their feelings one towards the other to be mixed up with an application to this court for the enforcement of a legal right, and if the court felt that the matters so irregularly brought under their notice required any further notice or proceeding on their part, it might be that they would bring these criminations and recriminations under the notice of the government, who would have the power to apply some remedy if they found the administration of public justice injuriously affected

In my opinion this rule must be discharged, and under the circumstances without costs.

Hagarty, J.—I agree with the learned Chief Justice. Mileage, as I understand it, is a recompense to the sheriff for the expense and labour of the travel which he has to perform in serving the process of the court. It can hardly perhaps be called a fee; it seems rather an equivalent or reimbursement for toil or travel actually undergone. The legislature has estimated the extent of the reimbursement. I think it must be actually, not constructively earned.

I agree also as to the panels.

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(The learned Judge also commented strongly on the unseemly state of facts disclosed in the affidavits filed.)

Morrison, J., concurred.

Rule discharged, without costs.

## COMMON PLEAS.

*(Reported by S. J. Vankoughnet, Esq., M.A., Barrister-at-Law, and Reporter to the Court.)*

### Brown v. Gossage et al.

*Action against maker and four indorsers of a note—Payment by two endorsers—Assignment of judgment under 26 Vic. ch. 45, sections 2, 3.*

G. made a promissory note to S. who indorsed it. DeG., D. and W. also indorsed it. B. discounted the note, which, not having been paid at maturity, was sued, and judgment and execution obtained against all the parties to it. W. satisfied the execution, whereupon G. and D paid him (he having been a mere accommodation endorser), S. and DeG. contributing nothing towards the payment. G. and D., thereupon, applied to B., under 26 Vic. ch. 45, secs. 2, 3, for an assignment to them of the judgment so obtained by him. in order to levy from S. and DeG. their share of the liability. This B. refused, S. and DeG. having informed him that by agreement they were to be relieved of liability.

*Held*, on application by G. and D. for an order to compel B. to assign to them the judgment, that on the authority of *Phillipps* v. *Dickson*, 29 L. J. C. P. 223, decided under Imp. Act 19 & 20 Vic. ch. 97, sec. 5, which in this respect is the same as Can. Act, 26 Vic. ch. 45, secs. 2, 3, the court had no power to grant the order.

(C. P., M. T., 1864.)

On the 29th October, 1864, *McBride* on behalf of Gossage and Doyle, obtained a summons in chambers calling upon the plaintiff to shew cause why he should not assign the judgment in this cause to them, or to a trustee for them, on the ground that they, or Wood, one of the defendants, for them, had paid the judgment, and that Scott and DeGrassi, the two remaining defendants, were still liable to them for their just proportion of the debt.

It appeared, that Gossage had made a promissory note to Scott, who had endorsed it; that De Grassi and Doyle had also endorsed, all of them being desirous of obtaining the money upon it for a joint enterprise. Wood, the last endorser, had endorsed it for their accomodation. Being thus endorsed, the plaintiff discounted it, and not being paid at maturity, the plaintiff put it in suit, obtained a judgment and issued execution. Wood satisfied plaintiff, and Gossage and Doyle thereupon satisfied him, Scott and DeGrassi contributing no part.

The object of Gossage and Doyle was to get the judgment and execution assigned to them, that they or their trustee might levy from Scott and DeGrassi their share of the liability.

*Moss*, on behalf of Brown, shewed cause, and filed Brown's affidavit, stating that he had been paid, as he understood, through Gossage, Doyle or Wood; that on communicating this application to Scott and DeGrassi, they had informed him that by the arrangement they were to be discharged from their liability; and that a suit had been brought in August last by Gossage and Doyle against them on this claim. He expressed his willingness to abide the decision of the court as to whether he should, or should not, assign the judgment to them.

J. Wilson, J., being in chambers, enlarged the summons till the fifth day of term, when *McBride* moved a rule *nisi* as in the summons.

During term *Moss* shewed cause:—The case is not within the statute 26 Vic. ch. 45. It is not the case of a surety for the debt or duty of another, or a liability with another for any debt or duty; but it is the case of the maker and one endorser seeking to enforce payment from two other endorsers of an alleged share of a joint dealing with the plaintiff—a predicament not contemplated by the statute. He cited Imp. Stat. 19 & 20 Vic ch. 97, sec. 5; 26 Vic. ch. 45 secs. 2, 3; *Phillipps et al.* v. *Dickson*, 29 L.J. C.P. 223.

*McBride*, in support of the rule:—The defendants were liable with one another for the debt to Brown, which Gossage and Doyle have paid. They can, therefore, avail themselves of the statute, without regard to their relationship to each other on the note; and are, consequently, entitled to the assignment asked for. Scott and DeGrassi cannot be injured, for these applicants cannot levy of them more than their just share; any attempt to levy more would be restrained by the court. He cited 26 Vic. cap. 45 secs, 2, 3; *Phillipps et al* v. *Dickson*, 29 L. J. C. P. 223.

J. Wilson, J., delivered the judgment of the court.

The 5th section of the Imperial Statute (19 & 20 Vic. ch. 97) is like the Provincial Statute (26 Vic ch. 45 sec. 2), on the authority of which this application has been made.

Two questions arise here: 1st. Are these applicants entitled to what they ask? and 2nd. Has the court the power to grant it?

If the court has not the power to grant this application it will be unnecessary to consider the first point.

The case of *Phillipps et al* v. *Dickson* was this: A. and B., two of the managing committee of a mining association, had been sued in separate actions by the solicitor to the association for £581 16s., the balance of his bill of costs. In the action against A. a verdict was taken by consent for £500, payable by instalments. Judg

ment was not to be entered unless A. made default. He did make default, upon which judgment was entered, and he paid the debt and costs. The action was stayed by a judge's order, on payment by B. of £550 by instalments, without prejudice to any rights the plaintiff might have against other persons in respect thereof. A. having applied under the 5th section to have the judge's order assigned to him, the court held that they had no power to make an order under that act.

*Willes, J.*, said—"Unless this act expressly gives the court jurisdiction to proceed by way of motion and order, we cannot help the defendant. He may apply to the plaintiffs to assign the order, and if they refuse he can bring an action."

*Byles, J.*, said—"The defendant has his remedy to enforce contribution, without any assignment of the judgment." And *per curiam*—"The court has no power to make the order."

On the authority of this case we refuse the order moved for.

Rule discharged with costs.

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Munsie v. McKinley et al.

*Division court—Jurisdiction—Interpleader—Title to land—Jury—Prohibition.*

The judge of a division court may, notwithstanding Con Stats. U. C ch. 19, sec. 54, subsec. 4, entertain an *interpleader* application to try the question of property in goods, even though the enquiry may involve the title to land. The judge himself must decide such application without the aid of a jury.

[C. P., M. T., 1864.]

In Trinity Term last, *O'Connor* had obtained a rule, calling upon the plaintiff and John Boyd, Esquire, junior judge of the county court of the united counties of York and Peel, to shew cause why a writ of prohibition should not issue to prohibit the said John Boyd, or other person authorized to hold the Sixth Division Court of the said united counties, from proceeding to try and determine, or from further proceeding in a certain interpleader summons issued out of the last mentioned court, whereby one Francis McKinley and the said William Munsie were called before the said division court, in order that the claim of the said Francis McKinley to certain property seized by one of the baliffs of the said division court, under process issued by the said William Munsie, out of the said division court, against the goods of William McKinley and Sidney McKinley, might be adjudicated upon, upon the ground that the title to corporeal hereditaments came in question, and the said court had no jurisdiction; and why the sum of £20 18s 2d., which the said Francis McKinley had paid into the said division court should not be refunded to him.

The affidavits shewed that the property in dispute was the crops growing on the east half of lot number three, in the tenth concession of the township of King, which one Pottage, the bailiff, had seized in the month of June last, as the property of William McKinley and Sidney McKinley; that William McKinley had conveyed the said land to Francis McKinley for a good and valuable consideration; and that the crops belonged to the said Francis McKinley, who had been in the continuous possession of the land from the date of the conveyance; that after the seizure Francis McKinley gave notice of his claim to the bailiff, who, thereupon, caused an interpleader summons to issue, calling upon Francis McKinley to appear, and prove and sustain his right to the said property; that on the first day of July last he did appear before the said John Boyd, Esquire, the said judge, and, by Mr. O'Brien, who acted for him, objected to the jurisdiction of the court, on the ground that the title to land came in question; that a jury which had been summoned at the instance of William Munsie was also objected to, on the ground that there was no provision of law for juries on such issues; that Mr. Boyd overruled these objections, and the case went to the jury, who found for Munsie; that afterwards a new trial was granted, on condition that the debt and costs should be paid into court, which was done.

During the present term, *Bull*, for Munsie and Boyd, shewed cause. He filed affidavits denying that the jurisdiction had been questioned, and cited, *Denton* v. *Marshall*, 7 L. T. N. S. 689; *Walsh* v. *Ionides*, 22 L. J. Q. B. 137; *The Queen* v. *Doty*, 13 U. C. Q. B 398; *Richards* v. *Maidenhead Local Board of Health*, 27 L. J. Mag. Ca. 73; *Joseph* v. *Henry*, 19 L. J. Q. B. 369.

*O'Connor* supported the rule, and contended that in order to sustain his claim, Munsie attacked the conveyance to Francis McKinley, so as to show that the title to the land on which the crops were growing was still in William McKinley, and thus brought the title to the land in question; and that instead of deciding himself on the interpleader matter, the judge had summoned and sworn a jury, for which he had no authority. He cited *Marsden* v. *Wardle*, 8 Ell. & Bl. 695; *Thompson* v. *Ingham*, 14 Q. B. 710; *Kerken* v. *Kerken*, 8 E. & B. 399; Con. Stats. U. C. ch. 19, sec. 54, subsec. 4, sec. 55, subsec. 2, secs. 61, 175.

*Hector Cameron* (*amicus curiæ*), cited *Trainor* v. *Holcomb*, 7 U. C. Q B. 548.

J. Wilson, J., delivered the judgment of the court.

The 4th subsection of section 54 of the "Act respecting the Division Courts" provides, that these courts shall not have jurisdiction in actions in which the right or title to any corporeal or incorporeal hereditaments comes in question. But the 175th section provides, that "in case a claim be made to or in respect of any goods or chattels, property or security, taken in execution, or attached under the process of any division court, or in respect of the proceeds or value thereof, by any landlord for rent, or by any person not being the party against whom such process issued, then, subject to the provisions of the 'Act respecting Absconding Debtors,' the clerk of the court, upon application of the officer charged with the execution of such process, may, whether before or after the action has been brought against such officer, issue a summons calling before the court out of which such process issued, or before the court holden for the division in which the seizure under such process was made, as well the party who issued such process, as the party making such claim; and the county judge, having jurisdiction in such division court, shall adjudicate upon the claim, and make such order between the parties in respect thereof, and of the costs of the proceed-

ing, as to him seems fit; and such order shall be enforced in like manner as an order made in any suit brought in such division court, and shall be final and conclusive between the parties."

In this clause is embodied this important provision, "that thereupon" (that is, upon the bringing of the party who issued the execution and the party claiming the goods before the court), "any action which has been brought in any of Her Majesty's superior courts of record, or in any local or inferior court, in respect of such claim, shall be stayed; and the court in which such action may be brought, or any judge thereof, on proof of the issue of such summons, and that the goods and chattels or property or security were so taken in execution, or upon attachment, may order the party bringing such action to pay the costs of all proceedings had upon such action after the issuing of such summons out of the division court."

By the statute the jurisdiction is limited, first, in all personal actions where the debt or damages claimed do not exceed forty dollars, and, secondly, to all claims and demands of debt, account, or breach of contract, whether payable in money or otherwise, where the amount or balance claimed does not exceed one hundred dollars.

If an action were brought in a division court to try the right or title to any corporeal or incorporeal hereditaments, or if a personal action, or an action for debt, account or breach of contract, or covenant or money demand, had been brought clearly beyond its jurisdiction, and attempted to be maintained, prohibition would have been granted. But in an interpleader matter, which is collateral to the action, is the jurisdiction limited? A quantity of goods, a single chattel, a piano or a horse, in value much exceeding one hundred dollars, may be the subject of dispute. Is there any doubt of the jurisdiction of the division court judges to try whose they are, in an interpleader matter? But the jurisdiction is limited in regard to value to forty dollars in matters of tort, which a seizure of the goods of B. for the goods of A. must necessarily be. The question of whose the land is, may arise on a claim of a landlord for rent from the bailiff, but the statute gives express jurisdiction; or it may arise, as in the case before us, on the question of whose the crops are; but it is a collateral question, arising in a matter collateral to the action. Does it therefore, follow that the court has no jurisdiction? There is no express limitation of jurisdiction in the act in reference to interpleader matters; and we may gather the intention of the Legislature that none was intended from the fact, that to enable a bailiff to make one hundred dollars and the costs of the suit, goods to a much greater value must necessarily be seized. To enable the judge to adjudicate upon claims for rent, might involve the question of title, for two might claim for rent adversely to each other. The clause quoted, which stays proceedings in any court for the alleged wrong in seising, implies the right in the judge to adjudicate upon rights to property and securities exceeding in value one hundred dollars, and contains no provision to prevent the judge from proceeding in case the inquiry involves the title to lands.

We, therefore, think the judge may, in interpleader, try whose the crops are, although the inquiry may bring the title to the land in question.

In regard to the question as to whether the judge alone is to adjudicate upon the claim in interpleader, or may summon a jury, or whether either party may summon a jury, we think the directions of the statute are plain: "The *county judge* having jurisdiction in such division court *shall adjudicate* upon the claim."

A new trial has been granted by the Division Court judge. We cannot presume he will act contrary to the express directions of the statute, and throw off the responsibility cast upon himself. But can we grant a prohibition on the statement that he has once improperly sworn a jury, and on the suggestion that he may do so again? We think not; and no doubt the opinion of the court in this respect will prevent the irregularity in future. The rule will be discharged.

Rule discharged without costs.

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### In the matter of Malcolm Ogilvie McGregor, an articled Clerk.

*Attorney's clerk—Discharge from articles—Practice.*

A clerk articled to an attorney, who, during the continuance of the articles, absconds, will be discharged from his articles.

Delivery of a copy of the rule *nisi* to the town agent of the attorney, and leaving copies at his place of residence and at his office, held sufficient service.

[C. P., M. T., 1864.]

*S. Richards*, Q.C., obtained a rule to shew cause why an articled clerk, named McGregor, should not be discharged from his articles, by which he was bound to an attorney of this court, who resided at the village of Elora.

It appeared by affidavit, that on the 16th day of March, 1860, McGregor had articled himself to one Gilkison, a practising attorney; and in this and other affidavits it was shewn, that in September, 1864, he had sold his furniture and effects, and left this province for parts unknown, without any intention of returning.

The rule was moved absolute, on affidavits shewing that the rule *nisi* had been served by delivering one copy of it to the town agent of Gilkison, and by leaving another copy at his last place of residence, and also at his office.

*S. Richards*, Q.C., moved the rule absolute, citing Con. Stats. U. C. ch. 85, sec. 15; 1 Arch. Prac. last ed. 40; *Ex parte Wilkinson*, 9 Dowl. 820; *Ex parte Hancock*, 2 Dowl. N. S. 54; *Ex parte Carnley*, 2 Dowl. N. S. 945.

No cause was shewn.

J. Wilson, J., delivered the judgment of the court.

The Imperial Stat. 6 & 7 Vic. ch. 73, contains clauses substantially the same as the 14 & 15 sec. of the Con. Stats. U. C ch. 85.

Before the passing of the Imperial statute, the Court of Queen's Bench had discharged the articles in the case of *Wilkinson* (9 Dowl. 820), which was one precisely like this. Neither that statute, nor ours, provides in words for the present case, but they do provide for cases where the attorney discontinues or leaves off practice.

In this case, the affidavits shew that the attorney has virtually left off practice, and has absconded. The statute provides for the former, the practice for the latter

The service of the rule being sufficient, we think it ought to be made absolute.

Rule absolute accordingly.

## COMMON LAW CHAMBERS.

*(Reported by* R. A. Harrison, Esq., *Barrister-at-Law.)*

### Hubbard v. Milne.

*Capias after action—Bail in one county—Filing bail piece in another—Defects in original writ and copy—Amendment—Costs.*

*Held*, 1. That a copy of a writ of *capias* after action should like the original writ, *show* the nature of the cause of action.

*Held*, 2. That in the note at the foot of the writ the word "calendar" should precede the word "months" and that the words "including the day of such date" should follow the words "from the date hereof."

*Held*, 3. That such defects as the foregoing, both in the writ and copy served when produced by defendant, may be amended on payment of costs.

*Held*, 4. That in the warning it is proper to direct the bail piece to be filed in the office of the clerk or deputy clerk of the Crown and Pleas for the county from which process issued, although a county different to that in which the arrest is made or bail given.

[Chambers, October 8, 1864.]

*J. B. Read* obtained a summons calling on the plaintiff his attorney or agent to shew cause why the writ of *capias* issued in this cause, and the arrest thereunder of the defendant, or the copy of such writ served on the defendant, or the copy and service thereof should not be set aside, and all proceedings under and by virtue of said writ of *capias* taken or had, with costs, and why the defendant should not be discharged from the custody of the sheriff of the county of Wellington, or his bail to such sheriff under and by virtue of said writ of *capias*, on the grounds following:

1st. That the bailiff arresting or professing to arrest said defendant, under and by virtue of said writ of *capias*, had not said writ of *capias* at the time of such arrest, or if he had, that such bailiff refused to shew the defendant such original writ at the time of his arrest, although the same was by the defendant requested.

2nd. That the copy of such writ served on the defendant did not, nor did the original writ, shew the nature of the cause of action, as required by the statute in that behalf.

3rd. That such copy of *capias* so served, and said original writ, were irregular, and contrary to the form of the statute in such case made and provided, in stating the *months* to be two *calendar* months from the date thereof, within which time the writ is to be executed, and in leaving out or striking out the words "including the day of such date" from the notice stating the time within which such writ is to be executed.

4th. That the said writ of *capias* and copy so served as aforesaid were irregular in the warning No. 2 to the defendant, endorsed thereon or subscribed thereto, in stating that the plaintiff should be at liberty to proceed in case defendant having given bail to the sheriff on his arrest, omits to file the special bail piece for his surrender to the sheriff of the county from which the capias issued in the office of the clerk or deputy clerk of the Crown and Pleas for the county of Ontario.

The defendant made oath, that on Saturday, the twenty-fourth day of September, A.D. 1864, he was arrested by a bailiff of the sheriff of the sheriff of the county of Wellington, by virtue of a warrant in his hands, purporting to be a warrant directed to the said bailiff, and commanding the said bailiff to take the defendant to answer the requirements of the writ after mentioned, or the supposed copy thereof; that his (defendant's) attorney demanded of the sheriff's bailiff a sight of the original writ of *capias* and a perusal thereof, and that the same was refused, on the ground that the bailiff had not the original writ, by virtue of which the warrant was granted; that defendant when arrested received from the sheriff's bailiff a paper annexed purporting to be a copy of the original writ of *capias*.

The following is a copy of the writ of *capias* as annexed to the affidavit, (the words between the brackets having been struck out):

Upper Canada, county of Ontario. [L S.]
Victoria, by the Grace of God, &c.
To the Sheriff of the county of Wellington, greeting:

We command you, that you take Robert Milne, if he shall be found in your county, and him safely keep until he shall have given you bail in the action on promises, which Isaac Brock Hubbard has commenced against him, and which action is now pending, or until the said Robert Milne shall by other lawful means be discharged from your custody. And we do further command you, that on execution hereof you do deliver a copy to the said Robert Milne; and that immediately after execution hereof, you do return this writ to our Court of Queen's Bench together with the manner in which you shall have executed the same, and the day of the execution hereof; and if the same shall remain unexecuted, [and shall not be renewed according to law] then that you do so return the same at the expiration of [six] two calendar months from the date hereof, [or of the last renewal hereof] or sooner if you shall be required thereto by order of the said court or a judge. And we do hereby require the said Robert Milne that within ten days after the execution hereof on him, inclusive of the day of such execution, he cause special bail to be put in for him in our said court, according to the warning hereunder written or endorsed hereon; and that in default of his so doing, proceedings may be had and taken as are mentioned in the warning in that behalf.

Witness, the Honorable William Henry Draper, C.B., Chief Justice at Toronto, the twenty second day of September, in the year of our Lord one thousand eight hundred and sixty four.

N.B.—This writ is to be executed within [six] two [calendar] months from the date hereof, [or if renewed, then from the date of such renewal, including the day of such date, and] but not afterwards.

(Signed) Robert Stanton.

WARNING TO THE DEFENDANT.

1. This suit, which was commenced by the service of a writ of summons, will be continued and carried on like manner as if the defendant had not been arrested on this writ of *capias*.

2. If the defendant, having given bail to the sheriff on the arrest on this writ, shall omit to put in special bail for his surrender to the sheriff of the county from which the writ of *capias* issued, and to file the bail piece in the office of the clerk or deputy clerk of the Crown and Pleas for the county of Ontario, the plaintiff may proceed against the sheriff or on the bail bond.

Issued from the office of the deputy clerk of the Crown and Pleas, in the county of Ontario.

(Sgned) J. V. Ham,
*Deputy Clerk.*

*Robert A. Harrison* shewed cause. He filed an affidavit of plaintiff's attorney, shewing the original writ containing the proper cause of action, and explaining that the alterations in the printed form of writ had been made by the deputy clerk of the crown who issued the writ. He argued that there was nothing in the first objection as a ground for setting aside either the writ or the copy; that as the original writ produced shewed the cause of action, the copy also produced by defendant could be amended by it, so as to remove the second ground of objection; that the legal construction of the word "months" as used in the warning was "calendar months," and so the omission of the word "calendar" was immaterial, and that for a like reason the omission of the words "including the day of such date" was immaterial, and so there was nothing in the third ground of objection; that the writ and copy were good as against the fourth objection; and that under any circumstances amendments ought to be allowed on payment of costs, rather than allow the writ, copy or arrest to be set aside. He referred to Con. Stat. U. C. cap. 22, schd. No. 6; Con. Stat. U. C. cap. 2, s. 13; Con. Stat. U. C. cap. 22, s. 222; *Wilson* v. *Storey*, 2 U. C. Prac. Rep. 304; *Keefer* v. *Hawley*, 1 U. Prac. Rep. 1.

*J. B. Read*, in support of the summons, abandoned the first ground of objection, but contended for the second, third and fourth, and argued that no amendment should be allowed.

John Wilson, J.—I shall allow the plaintiff to amend the original writ and copy on payment of costs. In the original writ the cause of action is properly stated, and the omission of it occurs only in the copy. That can be amended. Now as regards the office in which the bail piece is to be filed. The statute 2 Geo. IV. cap. 1 sec. 40, which authorized the appointment of commissioners for taking bail, directed that all recognizances of bail taken before them should be filed in the office of the clerk of the crown in the district where the same were taken, together with an affidavit of the due taking, &c. But sec. 8 of the Common Law Procedure Act enacts that all proceedings to final judgment in actions whether transitory or local, shall be carried on in the office from which the first process issues The Common Law Procedure Act must now be held to govern our practice. I think the rule broadly laid down in the act applies to this case, that plaintiff has given the proper warning to the defendant, and that the bail bond should be filed in the office from which the first process issues.

Order accordingly.

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## In the matter of James McGinnes.

*Mutiny act—Offence—Form of warrant of commitment.*

*Held*, that a warrant of commitment in which it was charged that the prisoner, on the 20th June, 1864, "and on divers other days and times," at the city of Kingston, did unlawfully attempt to persuade one James Hewitt, a soldier in Her Majesty's service, to desert, was bad, for it was impossible to say, upon reading the warrant, how many offences he had committed, or how the punishment was awarded.

[Chambers, October 10, 1864.]

This was an application by a prisoner, brought up under writ of *habeas corpus*, to be discharged from close custody, on the ground that he was in illegal custody.

The prisoner was in the custody of the gaoler of the United Counties of Frontenac and Lennox and Addington, on a warrant, signed by Thomas W. Robinson, police magistrate in and for the city of Kingston, and Jeremiah Meaghar, Esq., one of Her Majesty's justices of the peace of these United Counties, dated the 11th day of August, 1864, in which it was charged that the prisoner, on the 20th day of June, in the year of our Lord 1864, "and on divers other days and times," at the city of Kingston, did unlawfully attempt to persuade one James Hewitt, a soldier in Her Majesty's military service, to desert from Her Majesty's military service, and thereupon the prisoner was adjudged, for his said offence, to be imprisoned in the common gaol of the city of Kingston for the space of five months.

On the 29th Sept., 1864, the prisoner obtained the writ of *habeas corpus* and a writ of *certiorari*, directed to the said justices before whom he was convicted, and to the chairman of the Quarter Sessions of the Peace in and for the said United Counties.

The committing justices returned the proceedings had before them. The alleged conviction, which was written at the end of and immediately after the proceedings, was in these words:—"August 11, 1864, James McGinnes is convicted of attempting to persuade James Hewitt, an enlisted soldier, to desert from the city of Kingston, and is adjudged to be committed for five months in the common gaol." The justices certified that no record of conviction other than the foregoing had been had before them.

The chairman of the Quarter Sessions certified also that there was no record of any conviction of the prisoner among the records of the said court.

*Gwynne*, Q. C., on reading the writs of *habeas corpus* and *certiorari* and returns thereto, moved that the prisoner be discharged:

1st. Because there was no conviction to sustain the warrant of commitment.

2nd. Because the commitment was bad on the face of it for charging the prisoner with the commission of divers offences, the whole of which were punished by five months' imprisonment in the gaol of the city of Kingston, whereas each crime ought to have had its separate punishment.

3rd. Because the prisoner was sent to a gaol not known by the laws of this province, for the common gaol in the city of Kingston is the common gaol of the United Counties of Frontenac and Lennox and Addington.

4th. Because the warrant did not follow the conviction.

5th. Because the conviction was void, for the proceedings upon which it was founded did not appear to have been held before two or more justices of the peace, in accordance with the Mutiny Act under which the proceedings were had.

*S. Richards*, Q. C., shewed cause.

John Wilson, J.—The prisoner is entitled to his discharge. The commitment is bad on the face of it. The prisoner might have been imprisoned for the offence charged to have been committed on the 20th June, for any period not exceeding six months, and for each of the offences committed on "the divers days and times"

when the other attempts were made, he might have been imprisoned for a like period. I cannot tell how many offences he committed, or how the punishment has been awarded. If the prisoner were brought up again he would be unable to say whether he had been tried or not, for he could not tell for which attempt he had already been imprisoned.

Besides, on looking behind the warrant, no conviction is found to sustain it, nor in fact any conviction to sustain an imprisonment at all. For suppose the very words were used in the commitment which are cited in the alleged conviction, the commitment could not be sustained.

It is to be regretted that a proceeding like this should have been conducted so loosely, and with so little regard to the explicit direction of our own criminal procedure act, as to allow a prisoner to escape, who, but for want of ordinary care, might have suffered the legal punishment of an offence which there is no reason to doubt he committed.

I must, however, on the materials before me, discharge him, and shall so order.

Order accordingly.

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### In re Asher Warner.

*Ashburton Treaty—Con. Stat. Can. cap. 89—24 Vic. cap. 66—Who within the meaning of treaty—Second warrants—Review on the merits.*

*Held.* 1. That a person convicted of forgery or uttering forged paper in the United States who escaped to Canada after verdict, but before judgment, is liable to be delivered over to the authorities of the United States under the Ashburton Treaty, and the Provincial Statute passed to give effect to that Treaty.

*Held.* 2. That it is in the power of a magistrate acting under that treaty and statute after issue of a writ of *habeas corpus*, but before its return, to deliver to the gaoler a second or amended warrant, which, if returned in obedience to the writ, must be looked at by the court or judge before whom the prisoner is brought.

*Quære*, As to the power of the court or a judge on writs of *habeas corpus* and *certiorari* to review the decision of the examining magistrate under the treaty and statute.

[Chambers, October 20, 1864.]

On the 6th October, 1864, a writ of *habeas corpus* was issued by Mr. Justice John Wilson, addressed to the keeper of the county gaol of Essex, to bring up the body of Asher Warner, with the day and cause of his being taken and detained.

On the 20th October, the gaoler produced the body of Asher Warner, and returned that he had been in his custody since the 5th September last, under a warrant from the police magistrate at Windsor, delivered to him that day, and that since the receipt of the *habeas corpus*, and since a former informal return made by him to said writ, setting forth only a copy of the warrant, and on the 15th October instant, the said police magistrate delivered to him the warrant of commitment also annexed; and that on said 15th October, the sheriff had handed to him a warrant under the great seal of the province, dated 1st October instant, and that said Warner was in his custody under said respective warrants.

The first warrant stated that Warner was charged, on the oath of persons named, that he had on or about 7th January last, in Ohio, uttered, issued, &c., a certain forged paper (describing it), and directed prisoner to be kept "to be dealt with, and until he shall be delivered from your custody according to law."

The warrant received on 15th October set forth that Warner was charged on the oath of Earl Bell, with having committed within the jurisdiction of the United States of America, the crime of the utterance of forged paper, to wit, with having, on or about the 26th January, 1864, at Cleveland, Ohio, feloniously uttered, offered and disposed of, and put off as true, a certain forged paper, to wit, a certain forged and counterfeit fractional note, commonly called postage currency of the United States, given for the payment of fifty cents, and issued by the Secretary of the Treasury of the United States, with intent to defraud one Edwin E. Beeman, he the said Warner then and there knowing the same to be false, forged and counterfeit; that a warrant had been issued at Cleveland, and Warner had fled to this province; that he had been brought before the police magistrate on a warrant issued on such informations; that such evidence had been introduced as according to the laws of this province would justify the apprehension and committal for trial if the crime of which he is so charged, had been committed in this province. The warrant then committed him to gaol, "to remain until surrendered according to the stipulations of the treaty existing between Her Majesty and the said United States, ratified August 9th, 1842, and commonly known as the Ashburton Treaty, or until discharged according to law." It was dated 5th September, the same day as the first warrant.

*S. Richards*, Q.C., for the Crown conceded that the first warrant could not be supported, as the conclusion was insufficient on the authority of *Anderson's* case, 11 U. C. C P. 1.

*Gwynne*, Q.C., and *G. D. Boulton*, for the prisoner, objected, first, that the second warrant could not be resorted to, having been received after the receipt of the *habeas corpus*, and after the informal attempt to make a return. They also urged that, if receivable, it did not disclose an offence within the treaty; that the utterance of forged paper is not shewn in this warrant.

*S. Richards*, Q.C, shewed cause, and cited Hurd on *Habeas Corpus*, 615; *In re Smith*, 3 H. & N. 227; Con. Stat. Can. cap. 89; Imp. Act 6 & 7 Vic. cap. 76; 2 Hawk. P. C. 524; *Ex parte Cross*, 2 H. & N. 354; *Regina* v. *Richards*, 5 Q. B. 926; *In re Phipps*, 11 W. R. 730; *Ex parte Page*, 1 B. & Al. 572; *Rex* v. *Gordon*, *Ib.* in notes; *Ex parte Eggington*, 2 E. & B. 717.

Hagarty, J.—"A fractional note, commonly called postage currency, of the United States, given for the payment of fifty cents, and issued by the Secretary of the Treasury of the United States," may in my judgment, be fairly assumed to be a subject for forgery, and its utterance the utterance of "forged paper." Our own forgery statute applies to the forgery or uttering of any bill, note, undertaking or order for the payment of money, purporting to be the bill, note or undertaking, &c., of any foreign prince or state, or of any minister or officers in the service of any foreign prince or state, &c., or of any person or company of persons resident in any country not under the dominion of Her Majesty.

But it is contended that the second warrant cannot be relied on. Several cases cited by Mr. Richards, and especially *Ex parte Page*, 1 B. & Al. 571; and the case of *Rex* v. *Gordon*, cited in

the notes (where the second warrant was received after the *habeas corpus* issued, and only the day before prisoner was brought up), seems to me to establish the right to rely upon it.

*Reg.* v. *Richards* (5 Q. B. 926) recognizes the right to return and rely on a second warrant, lodged, however, before the *habeas corpus* issued. Lord Denman says, "It is impossible not to see that the gaoler has returned good warrants, upon which the parties may be lawfully detained." *In re Phipps* (11 W. R. 730) is also to the same effect.

The object of the writ of *habeas corpus* is to prevent illegal detention, and it requires the production of the prisoner, with the cause of his being detained. I can see no reason why any valid commitment received by the gaoler up to the moment of his making his return may not be properly looked to. The object of the writ is attained. I do not see that the receipt of the commitment before or after the issue or receipt of the *habeas corpus* can make any difference.

Mr. Gwynne objected, that as the magistrate had, after his first warrant, transmitted copies of the testimony to the Government, or even after committing prisonor in the first instance, he was *functus officio*. It seems to me that if this objection prevail, it must be equally fatal to all cases in which second warrants or commitments have been so often allowed to be lodged and relied on.

I am therefore of opinion that the return to the *habeas corpus* shows a good cause of detainer on the face of it.

A writ of *certiorari* has brought up all the papers and proceedings before the police magistrate; and I am now asked to review his decision, and to decide that the facts show the case to be not within the treaty.

Assuming that I have the right to review the evidence, the facts are very peculiar.

It appeared before the police magistrate that Warner was arrested on this charge in Ohio, by warrant dated 8th January, 1864. That an indictment of six counts, charging both forging and uttering, was found against him; and in the May term of the United States Circuit Court, he was arraigned, pleaded and tried. He was found guilty on the 2nd, 4th and 5th counts for the uttering, &c., and acquitted on the others. He then gave notice of motion in arrest of judgment, and was admitted to bail, to appear from day to day, to abide the order and judgment of the court. On the 23rd May there was an entry that the district attorney appeared; that Warner was then twice solemnly called to come into court and abide the judgment according to his recognizance; that he made default, as did his bail, and their recognizance was declared forfeited. The motion in arrest of judgment, with all the reasons of counsel therefor, appear to have been filed on the 24th May. On the 2nd June, a warrant, tested in the name of Chief Justice Taney, issued, addressed to the marshall, to take Warner, and have his body forthwith before the United States Circuit Court, to answer on an indictment presented by the grand jury, "and now pending in said court against him." On the 15th July, it would appear that his surety paid $2,500, the amount of the recognizance; that on the 12th July (according to the clerk's certificate) Mr. Justice Swayne, presiding judge, delivered an opinion overruling the motion in arrest of judgment; that no entry was made on the journal of the proceedings of said court, by direction of Hon. H. V. Wilson, district judge, and one of the said Circuit Court judges, for the reason that an application was made for a certificate of opposition of opinion between said judges on the points made on said motion; and that no action has been taken by the court on said application, and that no motion for a new trial has been filed.

If it were necessary for me to review the decision of the magistrate, I should say that the evidence of criminality taken before him was sufficient within the meaning of the treaty and statute. But the point chiefly pressed for the prisoner was, that as he had been tried and found guilty, his case was not affected by the treaty.

In addition to the evidence from official documents, the district attorney, who was examined, swore that the motion for arrest of judgment and a new trial had not been disposed of, and the accused had not been sentenced. He also swore that the fractional currency was in general use as a circulating medium in the United States.

The general object of the treaty is declared to be, that each power should deliver up to justice all persons who, being charged with the crime of murder, &c., committed within the jurisdiction of either of the high contracting parties, should seek an asylum or should be found within the territories of the other, provided that this should only be done upon such evidence of criminality as, according to the laws of the place where the fugitive or person so charged should be found, would justify his apprehension and committal for trial if the crime or offence had been there committed.

Our last statute provides that certain functionaries, on complaint on oath charging any person found within the limits of the Province with having committed any of the crimes mentioned in the treaty, may issue warrants for the apprehension of the person so charged, and may examine witnesses touching the truth of such charge; and then, if the evidence would justify his apprehension and committal (for trial if crime committed here), a warrant may go for his committal to gaol, to remain till surrendered under the treaty, &c. And section 4 provides that the Governor, by warrant under his hand and seal, may order the person so committed to be delivered up, &c., to the United States, to be tried for the crime of which such person stands accused, and such person shall be delivered up accordingly.

I am pressed now to decide that the treaty and statute do not provide for the case of a person against whom a verdict of guilty has been rendered, and who becomes a fugitive between verdict and judgment.

I think this depends on the significance of the words, "charged with the crime of murder," &c. Our Sovereign contracts (and Parliament sanctions her contract) to deliver up any person who, being so charged, seeks an asylum on British ground. I do not feel pressed by the words in our local act as to the Governor delivering him up "to be tried for the crime." If he should be a proper subject for delivery, we have nothing to do with the subsequent disposition of the offender, and the words cannot, I think, affect the question.

In what sense, then, did the treaty make use

of the words, "being charged with the crime of murder," &c.,—in a strictly technical or in a popular and wider sense? The object of the treaty was doubtless to prevent the ends of justice being defeated by the escape of an offender amenable to punishment. The contracting parties may, I think, be safely assumed not to have desired to deliver up persons suspected of or liable to be arraigned and tried for crime, and to extend complete protection to those actually proved to be guilty thereof The murderer escaping from the dock immediately on hearing the verdict of guilty would thus find a sacred asylum in Canada, although perhaps a week before he had been delivered up under the treaty to await his trial. Technically speaking, after verdict of guilty, and certainly after judgment, a man is incorrectly spoken of as "charged with the crime." The charge may be said to be merged (at all events after judgment) in conviction. In the treaty it may not have so narrow a construction. As Tindal, C. J., says, in one of the cases cited (7 M. & G. 504), "The word 'conviction' is undoubtedly *verbum equivocum*. It is sometimes used as meaning the verdict of a jury, and at other times in its more strictly legal sense, for the sentence of the court. The question is, in which sense is it used in the statute under consideration? If the verdict of a jury or confession by the party were sufficient to satisfy the statute, a door would be equally open to fraud So again the word 'acquittal' is *verbum equivocum*. It is generally said that a party is acquitted by the jury, but in fact the acquittal is by the judgment of the court."

It seems to me that I should not hold the words of the treaty to too narrow a construction; that if the words used to carry out a design of general utility can properly be construed so as to give effect to and not defeat that design, I am bound to adopt the larger construction.

In the very late case of *Regina* v. *Tivnan et al* (10 L. T. N. S. 499), Chief Justice Cockburn used language worthy of note on this treaty: "It seems to me that the moment you say you will give up offenders with a view to promote the large interests of justice throughout the whole civilized world, as a matter in which all nations have a common interest, you must then look to see what is the extent and scope of the mischief you thus desire to counteract and to prevent. * * * If the language of the statute is large enough to comprehend both these kinds of mischief, it is highly inexpedient to restrict it to one only."

The Chief Justice was overruled by the rest of the court, on the broad question that as piracy on the high seas is an offence against all nations, and therefore triable in England as well as America, the alleged pirates could not be given up under the treaty, which only governs cases where persons had sought asylum in a country where the offence cannot be tried.

I have arrived at the conclusion that the words of the treaty are wide enough to comprehend at all events the case of an offender who has become a fugitive from justice before judgment given against him for the offence.

It is this prisoner's own act that judgment did not at once follow verdict. He tried to obtain a reversal, gave bail to appear, and then flew from justice. I think I may still hold him to be comprehended under the words "charged with the crime of the utterance of forged paper," and that none of the subsequent words used can narrow their meaning.

The provision as to the evidence of criminality, being sufficient to justify his apprehension and committal for trial, if the offence had been committed here, merely furnishes a test as to the kind of evidence required. I hardly think the plea of *auterfois convict* is proved by production of the record and verdict endorsed. Where the statute allows proof of former convictions by certificate, the certificate must state the judgment on it (*Regina* v. *Ackroyd et al*, 1 C. & K. 158, Cresswell, J.); and in *Regina* v. *Drury*, (8 C. & K. 196), the law as to this plea is discussed. Sir J. Coleridge reviews the opinion, and cites Starkie's words: "If defendant, after conviction, remains either without receiving judgment or praying his clergy, he may be indicted for any other offence, or even for the same." And again: "It is clear that in respect of the plea of *auterfois acquit*, there must not only be the verdict, but judgment also, to make it of avail."

If my opinion had been favorable to the prisoner on the objections taken, I would have required further time to consider before directing his discharge on *habeas corpus*, if the warrant appeared sufficient. I share the grave doubts entertained by the late Sir John Robinson as to the right of the judges to interfere by this writ, except in the case specially provided by the 4th section of our Provincial statute, Con. Stat. C. cap. 89, when the person is kept over two months after conviction: "It may be a question, since the whole proceeding is founded on a public treaty between two sovereign powers, whether each party to that treaty cannot hold the other to a compliance with its terms without impediment from the exercise of a jurisdiction over the subject matter within either country, beyond what is provided for in the treaty." (*In re Anderson*, 20 U. C. Q. B. 156.) I also refer to the same case in 11 U. C. C. P. 1.

Since *Anderson's* case, a statute has been passed here making some alteration in the words as to the judge or magistrate adjudicating on the sufficiency of the evidence (24 Vic. cap. 6); and it must be borne in mind that the last act, withdrawing the case from ordinary magistrates, appoints the judges of superior and county courts, recorders and police magistrates, as persons fit to perform the required duties.

I have to treat Mr. Caron's warrant precisely as that of one of my brother judges; and if the warrant be unexceptionable, I am not free from the doubts above suggested.

In England the judges seem to feel no difficulty on this head, but the machinery provided for carrying the treaty into effect is very different.

As my judgment proceeds on other grounds, I express no positive opinion on this point.

I direct the prisoner to be remanded to the custody of the gaoler of the county of Essex.

See also *Ex p. Bessett*, 6 Q B. 481, and *Clinton's* case, Law Times, Nov. 1845, cited in Egan on Extradition, p. 48, and Hurd on *Habeas Corpus*, 615.

Order accordingly.

### Stinson q. t. v. Guess.

*Con. Stat. U. C. cap. 124, s. 2—Action for penalty—County court—Costs.*

*Held*, that a plaintiff suing a justice of the peace under Con. Stat. U. C. cap. 124, s. 2, for the penalty of $80, for not returning a conviction, is entitled to full costs without a certificate.

*Held*, that *O'Reilly* q. t. v. *Allen*, 11 U. C. Q. B. 526, until controverted by a decision of the full court, is binding on a judge sitting in Chambers.

[Chambers, Dec. 21, 1864.]

This was an action brought against defendant, a justice of the peace in and for the United Counties of Frontenac, Lennox and Addington, to recover the sum of $80, as a penalty, under s. 2 of Con. Stat. U. C. cap. 124, for not returning a conviction to the clerk of the peace as required by that statute.

The plaintiff recovered a verdict for the penalty of $80, but obtained no certificate for full costs, and afterwards taxed full costs in October last, before the deputy clerk of the Crown and Pleas at Kingston.

Defendant, in December last, appealed to the principal officer in Toronto, contending that plaintiff was entitled to recover county court costs only, but the master, on revision, affirmed the decision of the deputy clerk of the Crown.

Mr. Justice Morrison on 14th December issued a summons, calling upon the plaintiff to shew cause why the master should not be directed to review his revision of the taxation, upon the ground that the plaintiff having obtained a verdict for an amount within the jurisdiction of the county court, the master should have taxed the bill on the county court scale, and not on that of the superior courts.

*N. Kingsmill* shewed cause, relying upon *O'Reilly* q. t. v. *Allen*, 11 U. C. Q. B. 526.

*James Paterson* supported the summons, and argued that *O'Reilly* q. t. v. *Allen*, was decided without reference to the Interpretation Act (Con. Stat. Can. cap. 5, s. 6, sub. s. 17), and that it has since been decided by the Court of Common Pleas here, on the authority of the *Apothecaries' Company* v. *Burt*, 5 Ex. 868, that the county courts have jurisdiction in actions for penalties (*In re Judge of Elgin and Widdifield*, 12 U. C. C. P. 411) He also referred to Con. Stat. U. C. cap. 15, s. 16.

Adam Wilson, J.—I must take the case of *O'Reilly* q. t. v. *Allen*, 11 U. C. Q. B. 526, as a binding authority upon a judge sitting in Chambers. If the defendant think he can successfully controvert that decision, he must apply to the full court. In the meantime I discharge the summons for revision of costs.

Summons discharged.

### In re Lemon and Peterson, Attorneys, &c.

*Attorney and client—Order for delivery of bills—Costs.*

*Held*, where an order, silent as to costs, was made upon attorneys for delivery of bills of costs to a client, and the bills were afterwards delivered, and a subsequent order made for the taxation of costs of the reference to abide the event, that the costs of the first order could not be taxed as part of the costs of the reference.

*Held, also*, that no order could be made upon the attorneys by a judge different to the one who signed the first order for payment by them of the costs of the first order.

*Quære*, can attorneys properly be made to pay the costs of an order for the delivery of bills of costs?

[Chambers, Dec. 27, 1864.]

On 7th May, 1864, an order was made on Messrs. Lemon & Peterson, attorneys, to deliver their bills of costs to their client, Mr. Clarke, and that they should give their client credit for all sums received for him on 22nd August, 1864.

The bills were accordingly delivered, and referred to the master for taxation, with directions to tax the costs of reference, to be paid "according to the event of such taxation."

The costs were taxed, and more than one-sixth of the amount disallowed. The master in taxing the costs of the reference, disallowed to the client the costs of obtaining the order for the delivery of the bills of costs made in May, 1864.

The client obtained a summons calling on the attorneys to shew cause why the order of 22nd August, 1864, should not be amended so as to give the costs of the order of May, 1864, to the client, or why a separate order should not be made respecting the same.

*Paterson* shewed cause.

*Boyd* supported the summons.

Adam Wilson, J.—I see no authority to compel the attorneys to pay the costs of delivering their bills. Such costs were no part of the costs of the reference to the master, for the delivery of the attorney's bill and the taxation of it are two very different proceedings. The statute makes the costs of the *reference* abide the event of taxation; and it is these costs which the master has to certify. I cannot now order the attorneys to pay the costs of delivering their bills; nor do I think the judge could properly have made such an order. But at all events it was for him to have disposed of them by an express direction or by reserving them; and as he has not done so, it must be assumed either that he did not think that the attorneys ought to have paid them, or else that he has adjudicated upon them in effect by having said nothing about them.

I must discharge the summons with costs, to be fixed at ten shillings.

Summons discharged.

## CHANCERY CHAMBERS.

(*Reported by* Alex. Grant, Esq., *Barrister-at-Law, Reporter to the Court.*)

### Evans v. Evans.

*Garnishee order—Costs.*

A creditor applying for a garnishee order, is not entitled to the costs of the application

*Burns*, for a creditor, applied for a garnishee order. The amount due by the garnishee to the debtor was amply sufficient to pay the amount due the creditor, besides the costs of the application.

*S. H. Blake*, for the garnishee, consented.

*Hodgins*, for the debtor objected to paying the costs of the application. He cited *Bank of Montreal* v. *Yarrington*, 3 U. C. L. J. 185.

Spragge, V. C, after referring to the authority cited, said that the reason given there was, that the garnishee process was a new remedy, and that therefore the party taking advantage of it should not have his costs, and that, though he did not agree with the reason, yet, as it was the rule in a court of co-ordinate jurisdiction, it would be convenient that there should be a similar one in this court, and that

he should therefore follow it, until a different one should be established with the concurrence of the other members of the court.

Order granted without costs.

### Pipe v. Shafer.

*Final order for foreclosure—Occupation rent.*

Where the plaintiff (a mortgagee) is in occupation of the mortgaged premises, the master should charge him with occupation rent up to the day appointed for payment, so, where it appeared that a mortgagee under such circumstances had been charged with occupation rent, only to the date of the master's report, and had since continued in possession, the final order was refused.

This was an application for a final order for foreclosure. It appeared that the plaintiff had been, before the date of the report (February, 1864), and had since continued in the occupation of the mortgaged premises, but that the master had only charged him with occupation rent up to the date of the report. The day appointed for payment was in August, 1864.

Spragge, V. C.—The plaintiff has been in occupation from February till August, and has not accounted for any occupation rent for that time You must take a subsequent account, and appoint a new day for payment, one month from the date of the order, according to the practice. The registrar can take the account, and he had better charge the plaintiff with rent up to the end of the month.

## RECORDER'S COURT.

(Before the Recorder of the City of Toronto)

### In the matter of Bennet G. Burley.

*Ashburton treaty—Fugitive felons—British subjects—Belligerent rights—Robbery.*

*Held*, 1. That the Ashburton Treaty as to the extradition of fugitive felons, and our acts passed to give effect to it, extend to British subjects committing the offences named in the treaty, in the territory of the United States, and becoming fugitives to Canada.

*Held*, 2. That it is in the discretion of the magistrate investigating into a charge under the treaty against a person accused of one of the crimes mentioned in the treaty, to receive evidence for the defence.

*Held*, 3. That under the circumstances of the case as shewn, as well on the part of the prosecution as the defence, that the accused, who took the property of a noncombatant citizen by violence from his person, was guilty of robbery and liable to be surrendered under the treaty.

(Toronto, January 20, 1865.)

The prisoner, Bennet G. Burley, was charged with a robbery from the person of Walter O. Ashley, of a $20 treasury note of the United States, in use in the said States as current lawful money thereof

The robbery was charged to have been committed in the State of Ohio, one of the United States of America, on the nineteenth day of September, 1864

The charge was preferred, before the Recorder of Toronto, against the prisoner, under the laws in force in this province respecting the treaty between her Majesty and the United States for the apprehension and extradition, amongst others, of persons charged with the commission of the crime of robbery within the jurisdiction of the said United States.

From the evidence for the prosecution, it appeared that at the time of the committing of the acts complained of, viz., the 19th September, 1864, and for some time previous, civil war existed between the Confederate States of America and the United States of America. Johnson's Island is in Sandusky Bay, two miles from the city of Sandusky, in the State of Ohio, one of the United States of America, and is a military post of the government of the United States, having a military prison, reported and understood to contain between two and three thousand Confederate prisoners of war, and having the United States war vessel *Michigan* guarding the same. Ashley, the complainant, was a resident of the city of Detroit, in the State of Michigan, and a citizen of the United States, and owner jointly with other citizens of the United States of an American steamer called the *Philo Parsons*, an ordinary freight and passenger boat, running between the city of Detroit and the city of Sandusky, touching occasionally at the Canadian ports of Windsor, Sandwich and Amherstburg. Ashley was clerk on the boat. Whilst she was at her dock at Detroit, on the evening of the 18th September, the prisoner Burley had an interview with him on board, by which it was arranged that Burley should be a passenger in her next morning, for Sandusky, with three of his friends, who were to be taken on at Sandwich. The next day, being the 19th September, Burley came on as a passenger at Detroit, and his three friends at Sandwich. They had the address and manners of gentlemen. On the arrival of the boat at Amherstburg, about twenty men roughly dressed came on board and took passage for Sandusky, paying their fare. The only baggage brought on board here was an old trunk, which, as afterwards appeared, contained revolvers and axes. At about four o'clock, and after the boat had touched at Kelly's Island, in the State of Ohio, and had proceeded southerly about two miles towards Sandusky, having about eighty passengers on board, thirty of whom were ladies, the prisoner Burley appeared on deck, armed with a revolver, at the head of about twenty-five persons, who then armed themselves each with two large revolvers, and some with axes, from the old trunk, and took forcible possession of the boat and made prisoners of all on board. Burley threatened the life of Ashley if he refused to submit. A person called Bell, who took a leading part with the prisoner, came up to Mr. Nichol, the mate of the boat, enquired if he had charge, and said to him that as a Confederate officer he seized the boat and made him prisoner. It was declared among the party that the object in seizing the boat was to enable them to capture the *Michigan*, and to release their friends, the prisoners at Johnson's Island. The prisoner caused to be thrown overboard a portion of the pig-iron freight lying on the main deck, of which there were thirty tons, also a sulky. The iron might have interfered with the movements on that deck. The passengers had been assured that they should not be injured. Ashley had told some of the ladies that rebels had captured the boat. Subsequently this armed party arrived with the boat at Middlebass Island, in the State of Ohio, and there, under the command of the prisoner, captured the *Island Queen*, an American steamer, making her fast to the *Philo Parsons*, and making prisoners of all on board, including some twenty-five unarmed United States soldiers,

and had them all brought prisoners on board the *Philo Parsons*. Here a promise of secrecy for twenty four hours, as to what had occurred, was exacted from the ladies, and an oath to that effect from the male passengers—all of whom were then liberated and put ashore. They were not prevented from taking their baggage, and it did not appear that, beyond their imprisonment, any one of them had been molested or his effects interfered with. Here the prisoner and Bell went to Ashley, in the cabin of the *Philo Parsons*, and holding their revolvers in their hands, demanded his money. In peril of his life he took from his pocket a roll of bills, amongst which was the $20 bill in question, and which bills the prisoner and Bell took. They then also, in like manner, took about $10 more found in the drawer, consisting partly of silver. All of this money was the property of Ashley and his co-partners, owners with him of the *Philo Parsons*. Ashley was then, about nine o'clock at night, put ashore at Middlebass Island. The *Philo Parsons*, with the *Island Queen* fastened alongside, at once steered for Sandusky. After proceeding for about half an hour they set the *Island Queen* adrift, it was said scuttled. They were then distant from Sandusky about fourteen miles, by the route they were pursuing. Nichols, the mate, who had been detained in the hold a prisoner for two or three hours after leaving the island, was then called up. He found that they had got the boat into a pond. Subsequently he was directed to steer for Detroit River. He observed a Confederate flag on board. The wind was high. It was said amongst the party that they intended taking the *Michigan*, if they could, but that they had not made much by their coming down. Some of Nichols' clothes had been taken by them. On returning up the Detroit River, one of the party said it was well for some of the vessels then near by that they were in Canadian water, as otherwise they would have boarded them. Some of them asked Nichols if a banker did not reside at Grosse Isle. He replied yes, that one Ives did. It was then said, if it had not been so late they would have gone and robbed him. The boat was next morning, at Sandwich, abandoned by the party, and some of its furniture, which had been removed on shore, was also found there.

At the close of the case for the prosecution, the prisoner asked an adjournment in order to procure testimony on his behalf, and denied on oath the fact of having committed the robbery. To this the prosecution objected, contending that, under the treaty and the acts passed to give it effect, the Recorder was not to try the case, but merely to inquire as to probable cause. The Recorder held that he was bound, under the statute, to receive evidence as to "the truth of the charge," and admitted the evidence.

On behalf of the prisoner, evidence was given of his being a British born subject of her Majesty. He had been at the city of Richmond, in the State of Virginia, one of the Confederate States of America, in May, 1863, also in February and March, 1864, then appearing in the uniform of a Confederate soldier, having a badge of military rank; also of the fact of a military prison existing at Johnson's Island, containing from two to three thousand Confederate prisoners of war, and of one of the prisoners therein in September being then aware of an anticipated movement upon the place for their relief. A document under the official seal of the Department of State of the Confederate States of America, signed by Jefferson Davis and by Judah P. Benjamin, Secretary of State, dated at the city of Richmond, 24th December, 1864, was proved. This instrument recognizes the prisoner as an acting-master in the navy of the Confederate States of America, and alleges that to him, in September last, had been confided an enterprise for the taking of the steamer *Michigan* and the release of the prisoners at Johnson's Island, and that such enterprise had been authorised by the Confederate Government, and it closed in these words:—"And I do further make known to all whom it may concern, that in the orders and instructions given to the officers engaged in said expedition they were specially directed and enjoined to abstain from violating any of the laws and regulations of the Canadian or British authorities in relation to neutrality, and that the combination necessary to effect the purpose of said expedition must be made by Confederate soldiers, and such assistance as they might (you may) draw from the enemy's country." A document under the official seal of the Secretary of the Navy of the Confederate States, signed by the Secretary, S. R. Mallory, was proved. It certified a copy of an appointment of the prisoner, September 11th, 1864, to the office of an Acting-master in the Confederate navy.

This closed the evidence for the defence.

*M. C. Cameron*, Q. C., for the prisoner, claimed his discharge from custody, and contended that the Ashburton Treaty in no way applied to British subjects; but admitting that it did, argued that the prisoner had done no more than exercise a belligerent right, for which he had the authority of the Government of the Confederate States, and that whether the act was in the first instance authorized by that Government or subsequently adopted by it, the prisoner as a mere political refugee was not within the Treaty. He cited Wheaton's International Law, 6 Edn. 179; 1 Black. Com. 137; *Brown* v. *United States*, 8 Cranch. 133.

*S. Richards*, Q. C., for the United States, contended that what the prisoner did was to commit robbery, and was not justifiable as an act of war, and could not be and was not in fact ratified by the Government of the Confederate States. He cited Wheaton, part 4, cap. 2, s. 4, 5, p. 591 to 596, last ed.; Halleck, p. 412, 427, 456, 457, 458; 3 Phillimore, p. 74; Vattel, cap. 8, p. 165, 358, 359; *Reg* v. *Tivnan*, 10 L. T. N. S. 499.

*Robert A. Harrison*, for the Canadian Government, argued that Burley and those with him had violated the neutral territory of Canada, and could not therefore be allowed to say in the courts of that country that what he did were acts of legitimate warfare, that under any circumstances the property of non-combatants in time of war was protected; that the taking of such property by violence from the person was robbery, and that evidence if any, to excuse the act, could only be weighed before a jury in the tribunals of the foreign country. He cited *Two Brothers*, 8 C. Robinson, 164; *Lucas* v. *Bunce*, 4 Am. Reg. 98; *In re Anderson*, 11 U. C. C. P. 60; *Reg.* v. *Tivnan*, 10 L. T. N. S. 499; *In re Bennett*, 11 L. T. N. S. 488; *In re Kaine*, 14 Howard U. S. 103, 137; the case of

the *Chesapeake* in Nova Scotia; the case of *McLeod*, 6 Webster's Works, 247, S. C. 25 Wendell, 483.

Duggan, *Recorder*.—On behalf of the prisoner it is urged—first, that being a British subject, he is not within the provisions of the Extradition Treaty; second, that before and at the time of the committing of the acts charged as the robbery, war existed between the United States of America and the said Confederate States; that such act was one which the prisoner, then engaged in a belligerent enterprise, had by the law of nations a right to commit.

With regard to the first point the language of the treaty, as recited in our Act 22 Vic., chap. 89, of the Consolidated Statutes of Canada, is as follows:—"That Her Majesty and the said United States should, upon mutual recognition by them or their ministers, officers or authorities, respectively made, deliver up to justice *all* persons who, being charged with the crime of murder, or piracy, or arson, or robbery, or forgery, or the utterance of forged paper, committed within the jurisdiction of either of the high contracting parties, should seek any asylum or be found within the territories of the other."

The terms employed are plain and most comprehensive, embracing all persons, without exception or qualification of any kind. What persons, in the words of the treaty, are to be given up? Expressly "all persons who being charged," &c. That the treaty includes, and was intended to include, without exception, all persons, irrespective of country or nation, I entertain no doubt, and therefore hold that the prisoner, on the ground of his being a British subject, is not exempt from its provisions.

Then, as to the existence of war, I consider the existence of war proved. This important *status* is by the Supreme Court of the United States of America, in the judgment given on March 19th, 1868, in the case of the *Hiawatha* and *Amy Warwick*, distinctly recognized to be that of the contending parties. And I do not say that, taking into account the whole proceedings of the prisoner, as shown in the evidence for the prosecution, it may not be justly presumed that he was engaged in the enterprise which he and others acting with him professed. But I do say that it appears clear to me, upon the evidence, that the prisoner's arrangements for the alleged enterprise, the collecting of men and arms, were clandestinely made in this country, and were partially acted upon within this country, by proceeding from it direct with these men and arms into the adjoining territory of the United States of America, and that therein, and by these means, acts of hostility and violence were waged upon its non-combatant inhabitants—this country being happily at peace and in amity with the United States of America and with its people. I consider the above acts a flagrant violation of the public law and a gross injustice done to our country.

Then as to the taking from Ashley of his money by violence, and the putting him into peril of his life, the avowed object of the alleged enterprise was the release of the prisoners at Johnson's Island. Johnson's Island is in the State of Ohio, and far away from the scene of war and warlike hostilities. The country around is the abode of non-combatant people, engaged in the ordinary peaceful avocations of every day life, and it was through this country and amongst these people that the alleged enterprise was attempted to be carried out. Would it be lawful for the belligerent enemies of the nation to which these people belong, simply on the ground of being such enemies, without any necessity for the acts by violence, and at the peril of the lives of these people, to despoil them of their effects and plunder them at will? It is said by writers on international law that by the modern usage of nations, which has now acquired the force of law, private property on land is exempt from confiscation, with the exception of such as may become booty in special cases, when taken from enemies in the field or in besieged towns, and military contributions levied upon the inhabitants of the hostile territory. It is not pretended that the prisoner committed the act complained of under any of the circumstances suggested. Ashley, when deprived of his money by violence, and at the peril of his life, was to the knowledge of the prisoner such a non-combatant as I have described. If the prisoner on the occasion in question had an absolute right, without necessity of any kind, then to take Ashley's money at the peril of his life, would he not equally have had the right in like manner by violence to despoil of his money and effects every other non-combatant United States citizen whom he might happen to meet and choose to attack under colour of carrying out, or because of being engaged in, a belligerent enterprise? I do not find that such a right exists, or is sanctioned by the code of Christian and enlightened nations.

I have herein endeavoured to give all the facts and circumstances material on this proceeding, and I have now to state, in conclusion, that I find and determine that the evidence taken before me, according to the laws of this Province, on the charge of robbery here preferred against the prisoner, Bennett G. Burley, would justify the apprehension and committal for trial of the said Bennett G. Burley, according to the laws of this Province, for the said robbery, if the same had been committed in this Province.

Order for committal.

## GENERAL CORRESPONDENCE.

### *Judges—Their pay and their labors.*

To the Editors of the Law Journal.

Gentlemen,—I was much pleased to read your correspondent "Observer's" remarks respecting "Our judges, their labors and pay," in your last issue; but at the same time with yourselves, I do not endorse all his views.

It is not true that "the present state of things does not afford sufficient inducement to men of the highest rank in the profession to accept judicial offices." Mr. John Wilson and Mr. Oliver Mowat, both with a great

future before them in the profession, accepted judgeships under the present régime. Who would he call men of the "highest rank," if not Mr. Morrison, so long solicitor-general, Mr. Adam Wilson, or Mr. Hagarty? I say nothing of the two Chief Justices, or the Chancellor! This cry that the "highest rank" are not to be had has been so long reiterated as to be almost believed. I know of no refusals of the *honor*—for it is the *honor* which seduces them, regardless of consequences. So in the County Courts, many of our old M. P.'s are there—men who have gone through the ordeals of popular elections again and again, men who have assisted in making laws from year to year—and it is rather too bad that this continual sneer should be kept up that they necessarily take subordinate rank in town or country—in Toronto or elsewhere. I know that some of them repel the idea with considerable energy. Offer any number of the profession, in or out of Parliament, these openings, and you'll see. They will accept without much hesitation.

Let me say that I do not blame "Observer" for the remark. It is one of those popular fallacies floating about which he is not to blame for adopting.

In many of his other observations he is entirely correct. The government have the deaths of Sir James B. Macaulay and Sir John B. Robinson on their souls. Like true and well-tried servants, they stood out to the last, but nature could not do otherwise than succumb. Pray look at it. What these judges and their colleagues had to do, would have required thirty judges to accomplish in the State of New York! With all the desire of economy in the separate States of the Union, a principle of humanity seems to dictate a careful distribution of labor in all the departments, so that all men can live through the operation of becoming an official. As for county judges, there is a neglect of them by the Government, and a piling on of work upon them by the Parliament, which seems incomprehensible. If I have been correctly informed, one-third of them are ground down to the lowest possible point in respect to salary, even when the present law enables partial justice to be done them in this respect. Is there one of them who does not regret having accepted the honor of being selected from his fellows for a judicial position? Some do resign, to again try their fortune among their juniors, under many disadvantages, and it is to be hoped that the contempt with which they view the manner in which they and their former colleagues have been treated, may impel them to action in the matter, now that their hands are untied. Mr. Miles O'Rielly, and Mr. Kenneth Mackenzie, could each of them lend valuable aid in putting their old confreres, who dare not risk following their example, upon some fair footing.

Yours, &c.,

December 12, 1864. Coke.

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*Articled clerks acting in lay employments—Salaries—Effect thereof.*

To the Editors of the Law Journal.

Gentlemen,—Will you be kind enough to answer the following questions in your next Journal.

Can an articled clerk during the time of his service hold the office of treasurer, or collector, of a municipality?

Can he act as an official assignee under the Insolvent Act of 1864?

Can he act as an agent of an insurance company?

Can an articled clerk receive a salary?

See Con. Stat. U. C. cap. sec. 3, sub-sec. 1.

Yours, &c.,

A Member of the Law Society, U. C.

St. Thomas, Dec. 8, 1864.

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[No person is entitled to be admitted an attorney unless he has, during the whole of the term specified in his contract of service, been actually employed in the proper practice or business of an attorney. Where an articled clerk held the office of surveyor of taxes during the time for which he was bound, although it appeared that this occupied but an eighth part of his time, and that the remainder was devoted to the study of his profession, the service was held not to be sufficient (*Re Taylor*, 5 B. & Ald. 538). The court, in disallowing the service, said the service intended by the statute is a service to the master, continuing during the time and term of years specified in the contract of service, and not a service broken by devoting days and hours to a *different* employment accepted by the clerk (*In re Taylor*, 4 B. & C. 344, per Abbott, C. J. See

also *Ex parte Carr*, 3 Q. B. 447; *Ex parte Ridout*, T. T. 2 & 3 Vic.; R. & H. Dig., Attorney I. 1, 4; *Ex parte Hume*, 19 U. C. Q. B. 373; *Ex parte Smith*, El. & El. 928; s. c. 5 Jur. N. S. 515; 7 W. R. 451).

The nature of the employment, whether treasurer, collector, official assignee, agent of an insurance company, or otherwise, so long as *not* that of the attorney to whom the clerk is articled, is a matter of no consequence. All such are prohibited if they interfere with that of the due prosecution of the study of the law. The student is not to serve two masters. But we must add that in one case, where an articled clerk had accepted the office of auditor of a poor law union, the duties of which were performed by him as extra labor, *after* the close of business hours, it was held no objection to the service (*Ex parte Llewellyn*, 2 Dowl. N. S., 701). Mr. Justice Williams, in giving judgment, said: "If a man chooses to work extra time, and to make two days out of one, I do not see why he should not be at liberty to do so. The damage is to his own constitution, and not to his master" (*Ib.*). We do not find that this case has been followed in any subsequent case, and would not recommend it to be allowed as a precedent.

We know of nothing which, in Upper Canada, at present, prevents an articled clerk receiving a salary. It is, however, we believe, contemplated by the Benchers to make some regulation on the subject.—Eds. L. J.]

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*Profession of the law—Multiplication and deterioration—Remedies proposed.*

To the Editors of the Law Journal.

Gentlemen,—There is a very general feeling in the profession throughout the Province that something should be done to stop the influx into its ranks, and restrain it within legitimate limits; but no one seems to care about doing anything to prevent it.

The reason for such is, perhaps, with the majority of lawyers, a selfish one, but there are reasons of a far higher nature. It is the duty of every member of the profession to do all he can to elevate the tone and public standing of the profession; and it cannot be denied but that many are admitted, and many seeking admission into its ranks, who are not calculated to raise the standard in public estimation. Many wanting ability to assure an honorable practice are driven to various devices to earn a livelihood, which not only bring their own names into discredit, but also reflect disparagingly upon the profession to which they belong. I have heard it said that a leading counsel remarked "They are only fit to give briefs to a barrister." Granted. But the reputation of the body as a whole suffers from the pettifogging of its members, and each one is injured in the public estimation by the low practices of his brother professionals. Besides, the profession necessarily occupies a very prominent public place, and exerts a very powerful influence upon the community. It follows that the profession owes to the public the duty of admitting to its ranks only such as are capable of fulfilling their duty to that public. No system could be adopted which would secure this in every instance, but we think something might be done to lessen the evil.

There are enough already in the profession to meet the requirements of the public for many years, and a system much more stringent than that now in force might be adopted without injury to the public; and, whatever be the ordeal, many there will be who will pass it.

The public would gain in another respect. Many young men who are better fitted for another place in our social and political fabric, finding the road to the profession less easy of travel, would turn their attention to something else, and add so many more to our mercantile, manufacturing, agricultural, &c., population. And the wants of the country will be better satisfied by increasing these classes than the professions. There must be lawyers. They are as necessary a class as doctors, mechanics, farmers, or any portion of the community which go to make up the whole. No one but a lawyer can tell how much the community is injured by incompetent lawyers.

Assuming, then, that the evil exists, how is it to be remedied? It is said to be in contemplation to require every candidate to make affidavit, in addition to that now required, that he had served five years without fee or reward. This certainly would be a very effectual mode. It would be unfair, however, to such as have commenced their studies, if such a rule were to be adopted, to take effect at once; but no one could com-

plain if the rule were passed now, to take effect immediately after the expiration of five years. New students could not then complain that they had been unfairly treated. I think, however, that the interests of the public, as well as those of the profession, would be better served by fixing a shorter limitation, and requiring every applicant for admission, after a period of, say, two years, to swear that since that time he has not received fee or reward. As to those who have already commenced their time, another rule might also be adopted affecting them, having a shorter period of limitation, after which it would become operative—one requiring a greater amount of legal knowledge for call or admission. Such a rule might be framed to take effect after six or nine months, thus giving intending applicants ample notice to prepare themselves for the extra books. The fees on all of the examinations might also be increased with profit to the Society — suppose double what they now are. It is probable that would prevent half the present average from going up. I am opposed to monopolies, or any class system of rules or government; freedom of thought and action and competition is absolutely necessary for the development of professional ability; but there are limits to everything human. Go beyond these limits and that which before wrought good will now work evil. A small dose of arsenic will sometimes invigorate life, a large dose destroy it. There is no danger in Canada of a lawyer's talents becoming rusty for want of opposition. Contrast the difficulties attendant upon the acquiring the profession in England with our own Province. The simile is bad, for in truth there are no attendant difficulties here. Witness the illustrious names which in every generation the bar has given to England's glory. The way they have to travel is no smooth, easy one like ours. The more difficult a thing is of attaining, the more it is prized when attained, the more valuable it is. There is another auxiliary, one in the hands of the lawyers themselves, but it has passed into a proverb, that he who is his own lawyer has a fool for a client. It is truly surprising the amount of indifference the profession as a body show by their supineness to this state of facts, when so much is said by them about the rapid increase in numbers of their body. Every one talks about it, No one tries to remedy it. No aspirant experiences any difficulty in being articled. There may be some attorneys who exercise a discretion in entering into articles with clerks, and have a choice in whom they will admit into their offices, and permit *to fit themselves* for admission as attorneys. If any such portion there be, the number is few. As a general rule, an attorney will enter into articles with any one who applies, be he gentleman or vulgarian, black or white, educated or ignorant, intelligent or stupid; the rector's son or a stable boy, it makes no difference. The result is that the ranks of the profession are constantly receiving not very desirable recruits. I am no advocate for exclusiveness or caste, according to merit its due wherever found, but the gradations of society are as necessary a result of our existence as a race as is the alternation of day and night of the existence of the earth as part of the solar systems. The position of barrister is an honourable one. This is not, however, the proper place to discuss these questions; but I submit that there should be other requisites for call (and admission also) than mere ability to pass the examinations and pay the fees.

If lawyers were to adopt a uniform rule, and receive no articled clerks without a fee, and then only such as may be a credit to the profession, paying no salaries to articled clerks, a great boon would thereby be conferred upon both the public and the profession. What salaries they do pay, let them pay to clerks not under articles. True, higher salaries would have to be paid, salaries equal to what are paid to clerks in stores and counting rooms; but more time and work could be demanded from such clerks—as much as is demanded from clerks in stores and counting rooms. One such clerk would do the work of two under the present system, and the lawyers, individually, would be the gainers by such a change in the system. But I fear this is too much to expect. Lawyers get their work done by three or four clerks who do not feel themselves under any obligation to do more than six or seven hours' work a day, and the general impression is that the the present system is more economical. I do not think it is. Viewing it either as a present or future gain or loss, there cannot be a doubt but that it will be a

gain in the long run, inasmuch as it would diminish the number of practitioners, and it would be a gain for the time being as well. The leading offices would always get clerks, even if a heavy fee were demanded. If a few lawyers could be induced to adopt this system, others would soon follow. Each one will perhaps say, "I am willing, but what is the use of one trying such a plan." Every individual exercises some influence. Let one or two try it, and others will follow. We would suggest that practitioners in each locality form themselves into a sort of club, and adopt some system in this matter, to which all will agree to conform. It is not much to say that, under the present system, the profession must at least double every five years. It is suicidal to permit the present system to continue. I advocate a thorough change. For admission, let the practising attorney enter into articles with no clerk who does not bind himself to serve his full time without fee or reward, directly or indirectly, and who does not pay a fee to the attorney. Let the fees to the Law Society be doubled, and ditto of the examinations. For call, let fees and examinations be trebled. There is not sufficient distinction between the two professions here. Let there be a greater difference between the requisites for each, and the distinction will soon become more marked. Students, and those intending studying, may say, "Oh, it is all very well for you who are in the profession to talk this way!" This is no argument. Amongst those now in, as well as those who come in, the most able will get the best business. If the system is wrong, it is but a poor answer to say, "It has been so for thirty years, *ergo* it must continue for ever," for if such an argument were a good answer now, it would be equally so in five, ten, fifty, or a hundred years. Our colony is rapidly approaching manhood: let us do all we can for its welfare. If a system which may have worked quite well enough while the colony was in its infancy is found not suitable to our more advanced years, let us not permit any whining sentiment to prevent our applying the pruning knife. Both the country and the profession demand a change; the sooner one is effected the better for both country and profession. Let it be thorough, inaugurating such a system as will answer the wants of this generation.

In making these remarks I am actuated by no selfish motives, but offer them as one of the community, believing it to be for the weal of the community that a thorough change be made. And, granting that individual hardships might result from such a change, it is better that one of the community should suffer, if thereby the community as a whole be the gainer, than that the community should suffer and one be the gainer. And if young men find it easier to earn a living in some other walk in life, they will turn their attention to something else. There is ample scope, our country is young. Commerce, manufactures, agriculture, mechanics, mining, all present wide fields for enterprise and energy. There is no necessity for leaving the country, none other presents better prospects for young men of perseverance and application—given the will, the way can be made. Our resources are ample, requiring but individual thought and effort to develope them. If a portion of the community were forced to turn its attention to something else, the whole would be a gainer.

Much of the foregoing is applicable to the sister profession of medicine. Both professions are too easily obtained. The Law Society is in the hands of able and competent men; if, however, the profession is indifferent, the benchers may well be excused in letting things alone. If the governed are satisfied, the governor may well be quiescent.

December 20, 1864. A BARRISTER.

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[The elevation of our profession as a whole is a praiseworthy object. People may differ as to the means of attaining that end, but all will agree as to the desirability of the object proposed. Without committing ourselves to all the views of our able correspondent, we sincerely recommend his communication to all who have the welfare of our profession at heart, and in this instance the welfare of the profession and of the public is one and the same. But, while endeavouring to redress an evil of one kind, we must be careful not to go too far, and so fall into one of an opposite character. Many men of acknowledged ability have become members of our profession who would have been excluded had there been no salaries and high fees for admission. The standard of excellence may

be, and often is, attained by men whose youth is a struggle with poverty. Let the examination test be raised by all means, but we much doubt the propriety or necessity of raising the money test. We certainly think the examination test is not sufficiently strict. We believe that the facilities for calls to the bar, and for admission as attorneys, are too many. We should commence with increasing the standard of qualification, and if that were not found sufficient, should then be disposed to try some of the other means suggested by our correspondent. The whole subject is deserving of earnest and serious consideration, and no doubt at an early date will receive the attention of the benchers.—EDS. L. J.

## REVIEW.

THE INSOLVENT ACT OF 1864, WITH TARIFF, NOTES, FORMS, AND A FULL INDEX. By James D. Edgar, of Osgoode Hall, Barrister-at-Law. Toronto: Rollo & Adam, Law Publishers, King Street East, 1864.

This little volume must command an extensive circulation. The Act which it contains, and which it explains in annotated form, is as yet little understood, and many are interested in the speedy and correct understanding of it.

To attempt a comment upon an Act which has only been a short time in operation, in the absence of decisions to guide in its interpretation, is no doubt, as the compiler states, "a hazardous undertaking." But we have carefully examined his notes, and find that he has creditably acquitted himself. Some of his notes are of necessity speculative; but the greater part of them are practical.

The note to s. 2, as to persons entitled to make voluntary assignments, is well considered and carefully written; and, so far as we can judge, the conclusion at which the compiler arrives is undoubtedly correct. His note to s. 3, sub-sec. 2, as to the meaning of the word "trader," is one of the best on that subject that we have seen in any work of a similar kind to the one before us. We have not space to transcribe these notes, or we should be glad to do so for the information of our readers and as good examples of what they who become purchasers of this work may expect to receive. The two notes to which we have referred are, perhaps, the most elaborate in the work; but there are many others no less valuable for learning, and as repositaries of decisions early and late bearing upon the points suggested. We have been agreeably surprised to find to what a late period the compiler has brought down his cases. We observe reference to cases reported in current volumes of the *Law Times Reports* and *Jurist;* and at pages 35 and 81 we find noted the decisions of his honor Judge Logie in *Bagwell* v. *Thompson* and *Worthington* v. *Taylor*, as reported in 10 U. C. L. J. 304, 305.

This book, for the purposes of the Upper Canada lawyer, is more suitable than that of Mr. Abbott, which was reviewed by us in our last issue of the *Law Journal.* It would be well for all who can do so to become possessed of both; but those in Upper Canada who require one only cannot hesitate to prefer the work of Mr. Edgar. Those in Lower Canada who require one only will have as little hesitation in choosing Mr. Abbott's work. This might naturally be expected. The laws of Upper and Lower Canada, in regard to civil rights are so essentially different in their origin, that works in relation thereto, written in either section of the Province, must partake largely of the peculiarities in law of that section in which it is compiled. Hence in Mr. Abbott's work will be found many references to French law of as little service to the practical lawyer of Upper Canada as many of Mr. Edgar's references to English decisions will be to the practical lawyer of Lower Canada.

We are disappointed with the Tariff of Fees framed by the judges of the superior courts of Common Law and Chancery in Upper Canada, as compared with the Tariff framed by their brethren in Lower Canada, published in Mr. Abbott's work. Upon turning to Fees to Counsel in the Upper Canada Tariff, we read as follows:—

COUNSEL.

"Fee on arguments, examinations, and advising proceedings, to be allowed and fixed by the judge as shall appear to him proper under the circumstances of the case."

If there were only one judge in Insolvency the rule might not be very objectionable. But when we reflect that there are more than thirty, of different degrees of liberality, having different views as to amounts of fees that ought to be paid to counsel, we have little hope that there will be anything like uniformity. Perhaps there is no subject upon which even the judges of the superior courts so little agree as on the fees proper in amount for counsel, and certainly no subject more distasteful to them than applications for counsel fees. Whenever they can they throw upon the master the responsibility of settling the quantum of fees to be paid to counsel. We have known one judge *ex parte* to allow and to order a counsel fee of $50 to counsel for defendants at a Chancery hearing postponed at instance of plaintiffs owing to absence of witnesses, where nothing was done beyond opposing the application. We know other judges who would as soon sign warrants for their own committal to close custody as make such an order under such circumstances. We do not undertake to say who is right and who is wrong. We simply advert to the fact to shew how differently men high in authority view remuneration to counsel. This being so, it is hopeless to effect a uniformity of prac-

tice in this matter among county judges, chosen from different sections of the country, and who have little communication with each other in matters appertaining to their office.

We have looked cursorily through the Tariff of Fees for solicitor or attorney as between party and party, and also as between attorney and client. It is in detail, and appears to be framed in a fair and liberal spirit. There are, however, many proceedings authorized in the Act to be done by attorneys and solicitors for which no remuneration is fixed by this Tariff. But it such cases it is declared that the charges are to be the same "as for like proceedings in the Tariff of the superior courts." The analogy afforded is a proper one, and if closely followed will meet the expectations of those who framed the Tariff, and of those for whose benefit it is intended. So fees to sheriff and witnesses are to be the same as in proceedings in the superior courts. The fees to clerks are apparently unobjectionable. So the fees directed to be paid to the "Fee Fund."

We understand that Mr. Edgar's work was for a long time delayed in order to enable him to present the Tariff of Fees to his readers. He could not have done without it. The Act without it was incomplete. Now, however, the volume contains all that is necessary to make it a useful, complete, and reliable manual of our insolvency law. Not the least valuable part of it is the thorough index at the end of the work. A book without an index is a casket, more or less valuable, without a key. Mr. Edgar has done good service by furnishing to his patrons an index which is not merely very full but most skilfully prepared. It is not every man who is capable of preparing a good index. We could name more than one standard legal work which is shamefully defective in respect to its index. The value of a good index to a work of practical utility cannot be over estimated, and we are glad to announce that Mr. Edgar has not been unmindful of this element of value in the book before us. The mechanical execution of the work is also all that can be desired, and reflects credit upon the enterprising publishers—Messrs. Rollo & Adam.

The work is, by permission, dedicated to the Honourable William Henry Draper, C. B., Chief Justice of Upper Canada, as a slight tribute to those varied talents that adorn his high position. No man in Upper Canada is so deserving of the honour. If the judges whose duty it will be to administer the provisions of the Act, while in the discharge of their duties endeavour to emulate the patient industry, dignity, affability and learning of the Chief Justice, much good will be accomplished throughout the several counties of Upper Canada.

## INSOLVENTS.

| | |
|---|---|
| Strobridge & Botham | Brantford. |
| Sidney Smith | Peterboro'. |
| Joseph James Inglis | Brantford. |
| Henry Wilkinson | Brantford. |
| Amos James Fisher | Peterboro'. |
| George P. Brewster | Montreal. |
| Hiram Sedgwick | Peterboro'. |
| John Struthers | Brantford. |
| Robert H. Gardner | Bayfield. |
| George S. Pickell | Belleville. |
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| Edgar & Melville | Hamilton. |
| Donovan Sills | Tp Fredericksburgh. |
| Marshall P. Roblin | Napanee. |
| Owen S. Roblin | Newburgh. |
| T. McCrossan | Toronto |
| Robert J. Hamilton | Hamilton. |
| Milton Davis | Hamilton. |

*(To be continued.)*

## CHANCERY SPRING CIRCUITS, 1865.

THE HON. VICE-CHANCELLOR MOWAT.

| | | |
|---|---|---|
| Toronto | Monday | 20th March. |

THE HON VICE-CHANCELLOR SPRAGGE.

| | | |
|---|---|---|
| Hamilton | Monday | 3rd April. |
| Brantford | Tuesday | 11th " |
| Guelph | Friday | 14th " |
| Barrie | Wednesday | 19th " |
| Whitby | Monday | 24th " |
| Lindsay | Friday | 28th " |
| Niagara | Wednesday | 3rd May. |

THE HON. THE CHANCELLOR.

| | | |
|---|---|---|
| Sarnia | Thursday | 20th April. |
| Sandwich | Saturday | 22nd " |
| Chatham | Tuesday | 25th " |
| Woodstock | Thursday | 27th " |
| Goderich | Tuesday | 2nd May. |
| London | Friday | 5th " |
| Simcoe | Thursday | 11th " |

THE HON. VICE-CHANCELLOR MOWAT.

| | | |
|---|---|---|
| Belleville | Friday | 5th May. |
| Kingston | Monday | 8th " |
| Brockville | Thursday | 11th " |
| Cornwall | Saturday | 13th " |
| Ottawa | Tuesday | 16th " |
| Cobourg | Monday | 22nd " |
| Peterborough | Friday | 26th " |

## APPOINTMENTS TO OFFICE.

QUEEN'S COUNSEL.

NESBITT KIRCHOFFER, ALBERT PRINGE, JOHN ROAF, and EDWARD D. BLAKE, of Osgoode Hall, Esquires, Barristers-at-Law, to be Queen's Counsel in Upper Canada. (Gazetted, December 31, 1864.)

NOTARIES PUBLIC.

JULIUS P. BUCKE, of Ottawa, Esquire, Barrister-at-Law, to be a Notary Public in Upper Canada. (Gazetted, December 31, 1864.)

JOHN COOK, of Newmarket, Esquire, to be a Notary Public in Upper Canada. (Gazetted, December 31, 1864.)

WARREN TOTTEN, of Paris, Esquire, Barrister-at-Law, to be a Notary Public in Upper Canada. Gazetted, Dec. 31, 1864.)

ISSUERS OF PASSPORTS.

JOSEPH WILSON, of Sault Ste. Marie, Esquire, and ALONZO B. DANA, of Brockville, Esquire, to issue Passports and Certificates to British Subjects, about to travel in foreign parts. (Gazetted, December 3, 1864.

DAVID BURN, of Cobourg, FREDERICK JNO. PARSTON, of Clifton, HUGH RICHARDSON, of Woodstock, JOHN TWIGG, of Picton, WILLIAM GRANT, of St. Catharines, CHAS. E. PEGLEY, of Chatham, JOHN ALEXANDER, of Barrie, H. K. SANDERS, of Port Hope, JOSEPH R. BROWN, of Dunnville, and SAMUEL S. MACDONNELL, of Windsor, Esquires, to issue Passports and Certificates to British Subjects about to travel in Foreign Parts. (Gazetted, December 31, 1864.)

## TO CORRESPONDENTS.

"COKE," "A BARRISTER," under General Correspondence.

"LEX" too late for this number.

## DIARY FOR FEBRUARY.

1. Wed ... Grammar School Trustees to meet.
2. Thur .. *Purification of B. V Mary.*
5. SUN ... *5th Sunday after Epiphany.*
6. Mon ... Hilary Term commences.
10. Frid.... Paper Day, Q. B. New Trial Day, C. P.
11. Sat .... Paper Day, C. P. New Trial Day, Q. B.
12. SUN ... *Septuagesima.*
13. Mon ... Paper Day, Q. B. New Trial Day, C. P.
14. Tues ... Paper Day, C. P. New Trial Day. Q. B.
15. Wed ... Paper Day, Q, B. New Trial Day, C. P. Last day [for service for Co. Ct.
16. Thur ... Paper Day. C. P.
17. Frid.... New Trial Day. Q. B.
18. Sat .... Hilary Term ends
19. SUN ... *Sexagesima.*
24. Frid.... *St. Matthias.*
25. Sat .... Declare for County Court.
26. SUN ... *Quinquagesima.*
28. Tues ... *Shrove Tuesday.*

## NOTICE.

*Owing to the delay that has unavoidably taken place in the issue of the January number and of this number of* Law Journal *and* Local Courts' Gazette, *the time within which payments must be made to secure the benefits of cash payments is extended to* 1st *April next.*

*Owing to the very large demand for the* Law Journal *and* Local Courts' Gazette, *subscribers not desiring to take* both *publications are particularly requested at once to return the back numbers of that one for which they do not wish to subscribe.*

THE

# Upper Canada Law Journal.

FEBRUARY, 1865.

## THE RECENT CHANGES.

We have most favorable accounts from all quarters of the reception of the *Law Journal* and the *Local Courts' Gazette*, and have every reason so far to be satisfied with the result of our exertions.

Some few there are amongst the magistracy and municipal bodies that seem to labour under the impression that it is quite out of the power of any mortal to add anything to their stock of knowledge, and so long as they have the Consolidated Statutes," which they fondly imagine contain *all* the law on every subject, they think they cannot go wrong. The less such people *really* know the more they *think* they know. Fortunately the localities blessed with such luminaries are few, and there appears to be a growing desire on the part o those connected with magisterial and municipal duties to use every means of increasing their stock of information. The first judges in the land find it necessary to keep themselves well posted in the current law; and it is an invariable fact, that those who know most are always the persons most anxious to learn more.

The Council of the County of Simcoe have taken the lead in this respect amongst the municipalities. They have with commendable enlightenment and liberality ordered several copies of both publications for the use of the County Council, and two copies of the *Local Courts' Gazette* for the use of each local municipality in the County. We venture to promise that it will not be money thrown away. Certainly not if we can help it. What will be useful for one county will be of the same advantage to another, and we hope to find this example followed by the majority of the other County councils in Upper Canada.

We have every reason to believe, and are extremely glad to be able to say so, that the changes that have been made have met with such general approbation from persons of influence and intelligence.

## THE BURLEY CASE.

We give in other columns a very full and carefully prepared report of this important case as finally decided in Chambers before the Chief Justice of Upper Canada, assisted by the Chief Justice of the Common Pleas, Mr. Justice Hagarty, and Mr. Justice J. Wilson. It is one of the most important cases ever decided in Canada.

We had intended giving in this number some remarks on this case, and the law of extradition generally, but want of space compels us to defer them till our next.

## WHAT IS AN ARBITRATOR?

Is an arbitrator the agent and advocate of the person who names him to settle a dispute employed to protect and further the interests of his client, or is he a judge—bound in honour and conscience to decide impartially and righteously, "without fear, favour or affection," and according to the truth of the case, without reference to its being adverse or favourable to the person appointing him?

Some may smile at the simplicity which asks such a question. All upright and intelligent men will answer that the latter definition alone describes the arbitrator proper, and that the former only suits the ignorant or dis-

honest man appointed to a duty for which he is wholly unfit.

We believe that by the mass of our people the true position of an arbitrator is utterly misunderstood. The common mode of settling a dispute is "to leave it to two men." Each disputant appoints "his friend," whom he fully expects to look wholly to his interests, to object to everything that bears against him, and to consent to nothing that may prejudice him, and the friend so appointed is generally too ready to do all this most faithfully. His opponent does just the same, and instead of two honest men sitting down to decide uprightly and impartially on the facts, without reference to the parties, we have two advocates each striving with might and main to stand by the man who named him, and with no chance of making an award except by calling in some third person, at increased expense, to turn the scale in favour of one or the other.

Now almost universal as this is in practice, it is, to say the least of it, a monstrous perversion of plain duty. An arbitrator, no matter by whom appointed, is to all intents and purposes a judge, and if he be an honest man and know his duty, he should feel as much shocked at leaning to one side or the other, or favouring one man above the other, as he would be if he saw a judge in court exhibiting favour or partiality. But this, the only true and honest view of an arbitrator's duty, seems to be little understood.

Numerous instances have occurred, and are occurring among us, of the strange misconception that prevails. Arbitrators are heard talking of "their clients," meaning those who named them, just as the lawyer speaks of the person who retained his services. Men in good social position, who would be highly indignant at the imputation of dishonesty or ignorance, so speak, and what is worse, so act on arbitrations, not seeking even to disguise their advocacy of their client's interests; and yet beyond all shadow of doubt such men are either wholly ignorant of their duties or too dishonest to regard their proper performance. Instances are known of such men admitting that they bargained for a commission or per centage on whatever amount they could get awarded to the "client"! Between such and the judge who takes a bribe to pervert his judgment, there is no moral distinction whatever.

Awards have been made, intelligible on no principle deducible by an impartial mind from the facts in evidence. In the case of contests between individuals and public companies, the results are sometimes ludicrous, were it not for the serious consequences involved. Compensation has been, before now, awarded for a strip of land to an amount exceeding what any man, in his senses, would give as the price of the whole property from which the strip was taken. But these instances are of rare occurrence compared with the numberless cases between individuals occurring daily throughout the country.

Besides, men dead to the plainest dictates of duty, are generally too much alive to their own interests. The one is frequently the effect of the other. Men who scruple not to gain all they can, honestly or dishonestly, for those who employ them, seldom forget themselves. The consequence is, in many cases, not only awards outrageously unjust, but saddled with huge bills of costs in the shape of arbitrators' fees, modestly assessed by the arbitrators themselves.

It is well to call attention to this state of things. We believe there are many really honest and respectable men who misconduct themselves as arbitrators from mere ignorance of duty. The prevailing idea seems to be that an "experienced" arbitrator's duty, as it generally is his practice, is on the one side to get the largest possible sum of his friend, if the friend be seeking compensation, or on the other hand if the friend be resisting payment, to strive hard to reduce the amount to the smallest sum, or to resist it altogether.

The evil is one of a most serious kind, and any person who can succeed in attracting public attention to it will deserve the thanks of all. As a large portion of the evil results from misconception, it is only necessary, so far as honest mind is concerned, to explain the true position of the case. The legislature is constantly providing for the settlement of disputes by arbitration, and it is of the highest importance that men should rightly understand that an arbitrator is not an advocate or a partizan bound to stand by his client, but that he is a judge, bound to decide with rigid impartiality, and that if he favour one side more than another, or needlessly heap expenses on either party to the reference, he does not act the part of an honest man.

## TIME IS MONEY—AN INCIDENT.

During Hilary Term two Queen's Counsel in the Court of Common Pleas, disputed as to the responsibility of setting down an appeal from a County Court, which had been set down during a previous term, but, owing to some defect in the proceedings, not heard. The expenditure involved was the crushing sum of fifty cents. The clerk of the court, with becoming dignity and a keen eye to the revenue, refused to receive the appeal books unless some one gave him a fifty cent stamp. The connsel for the appellant declined to pay as he said he had already disbursed that amount during the previous term. The counsel for the respondent contended that it was no part of his business to pay for setting down the appeal of his adversary. When the learned gentlemen were about to argue the weighty point in due and ancient form, the Chief Justice, much to the relief of counsel who had cases ready for argument, called the usher of the court, gave him a $1 bill, and ordered him to purchase a fifty cent stamp and hand it to the clerk of the court. This the usher did, whereupon the clerk was ordered to receive the appeal and "mark the fees paid." The business of the court was then proceeded with without further loss of time.

## OUR APPEAL.

We are glad to say that the county judges, with one exception, have most kindly responded to our appeal for support.

The exception is that of a judge whose name out of charity we repress, but the only judge in the Province, we venture to say, that could indite such an epistle as the following:

"Judge ——— has the honor to acknowledge the receipt of the letter of the Editors of the *Upper Canada Law Journal* of date of Feb'y 1st instant.

"Judge ——— most respectfully begs to inform the Editors that he does not *understanding* touting for newspapers, and suggests that some better qualified person should be employed.

"———, Feb'y 4, 1865."

The *learned* Judge greatly misunderstands us if he supposes that by sending him the circular we intended him to infer that he understands "touting for newspapers" any better than he understands law or English grammar. We hoped in exchange for the law that he so greatly needs, to receive, at least, the politeness of a gentleman and the support which his position as a Judge is *supposed* to give him. It is quite possible that he has not the influence we naturally imagined he had, and his excuse, under the circumstances, we are willing to accept. We have no doubt that we can easily find a person "better qualified" than himself to explain to others the value of that which he does not appear to understand.

The writer of the note before us professes to have, we are informed, a sovereign contempt for "American jurists," and has no favorable opinion of our own, for he finds that the cases in our Superior Courts "rather embarrass him than otherwise!" He is therefore consistent enough in declining to interest himself for a publication intended to circulate a knowledge of those very decisions.

## HILARY TERM, 1865.

### CALLS TO THE BAR.

The following gentlemen during this term passed the necessary examination qualifying them for call to the Bar of Upper Canada:

H. Bird, Woodstock; H. H. Coyne, London; F. Duggan, Toronto; F. M. Fairbairn, Peterboro'; George Airey Kirkpatrick, Kingston; J. F. McDonald, Ingersoll; D. Mitchell McDonald, Toronto; Ewan McEwan, Kingston; George Kennedy, Toronto; F. A. Read, Toronto; R. N. Rogers, Kingston; C. Scott, Stratford; J. F. Tom, Goderich.

Messrs. Coyne and Kirkpatrick were not required, owing to their very creditable written examinations, to go through the ordeal of the *viva voce* examination.

### ADMISSIONS AS ATTORNEYS.

The following gentlemen during the same term were successful in passing their examinations for admission:

Richard R. Brough, London; Jno. J. Brown, London; John M. Bruce, Hamilton; Fred. Duggan, Toronto; James H. Esten, Toronto; Donald Gilchrist, Brampton; C. E. Hamilton, St. Catharines; John E. Hardinge; Erskine Irving, Hamilton; George Kennedy, Toronto; G. Airey Kirkpatrick, Kingston (without oral examination); George Lount, Barrie; J. A. Macpherson, Whitby; James F. McDonald, Ingersoll; Edward Morrill, Picton; J. J. Murphy, Ottawa; N. F. Paterson, Toronto; J. F. Patterson, Toronto; R. V. Rogers, Kingston; S. W. Scane, Chatham; F. P. Thompson, St. Catharines; Henry Totten, Brantford; J. White, Windsor.

# UPPER CANADA REPORTS.

## COMMON PLEAS.

(*Reported by* S. J. Vankoughnet, Esq., M.A., *Barrister-at-Law, and Reporter to the Court.*)

### Hall v. Gosler.

*Fi. fa. lands—Seizure—Expiration of writ—Abandonment—Return.*

The expiration of a *fi. fa.* lands before the intended day of sale, which has been regularly advertised, does not cause a cessation of the seizure, which the *commencement* of the advertisement is.

In this case, where lands had been advertised under other writs, the plaintiff's writ of *fi. fa.* being at the time in the sheriff's hands,—*Held*, that although the sale under the writs so advertised neither took place nor was adjourned, yet that the plaintiff's writ operated upon the lands under the seizure by such advertisement, and that the return of "lands on hand" to this writ after its expiry was, under the circumstances, the only return which could have been made; and further, that the sheriff might have proceeded at the plaintiff's suit without a *venditioni exponas* to sell the lands then in his hands.

*Held*, also, that the non-adjournment of the sale advertised for 12th September, 1863 (which did not take place), and the publication of an apparently independent notice in the following June, under the plaintiff's writ of *ven. ex.*, did not necessarily and conclusively constitute an abandonment of the seizure, which had been lawfully made under the former writs; although no positive rule could be laid down as to what would constitute an abandonment of lands once seized, this being a matter of fact which must rest very much upon intention.

[C. P., M. T., 1864.]

*C. S. Patterson*, on behalf of the sheriff of the United Counties of Northumberland and Durham, obtained a rule on the plaintiff and defendants to shew cause why the rule requiring the sheriff to to return the writ of *venditioni exponas* and *fieri facias* for the residue should not be set aside, either in the whole or so far as the same relates to the *venditioni exponas*, on the ground that no lands were seized or were seizable thereunder by the sheriff; that no lands were seized by sheriff Fortune under the original writ of *fi. fa.*, or if seized the same did not come into the hands of the present sheriff; and that the writ being returnable only after execution thereof, and not having been executed, the sheriff could not be ruled to return it.

The facts agreed upon between the plaintiff and the sheriff, and upon which the rule was granted, were in effect, as follow: the *fi. fa.* against lands in this suit was issued on the 30th of August, 1861, and delivered to sheriff Fortune on the following day, and was renewed on the 14th August, 1862: the return to it was made by sheriff Fortune on the 29th of August, 1863, "lands on hand": the *ven. ex.* and *fi. fa.* against lands for residue was issued on the 10th of November, 1863, and was received by sheriff Fortune on the 16th of that month.

There were two writs against lands, at the suit of the Commercial Bank, issued on the 23rd July, 1861, received by sheriff Fortune on the 25th of the same month, renewed on the 27th of June, 1862, and returned by sheriff Fortune, "no lands," on 3rd Sept., 1863, one of which was against both these defendants, the other against one of them only.

On the 5th September, 1863, the Commercial Bank delivered to sheriff Fortune two writs of *alias fi. fa.* against lands, which were renewed on the 30th of August, 1864.

Before the return of "lands on hand" there had been no advertisement of lands by the sheriff in which this cause was named, but an advertisement purporting to be under the two writs of the Commercial Bank, was inserted in the "*Cobourg Star*," a newspaper published in Cobourg, on the 17th of June, 1863, giving notice that the defendant's lands would be sold on the 12th of September, 1863, This advertisement was continued weekly in the "*Cobourg Star*" until the 5th of September, 1863, and it was published in the *Canada Gazette* on the 25th of July, 1863, and continued until the 12th of September following. No sale, or attempt at sale was made on the 12th of September, 1863, in pursuance of the advertisement, nor was the sale adjourned to any future day.

Sheriff Fortune was superseded in his office on the 9th of March, 1864: Sheriff Waddell, the present applicant, was appointed sheriff on the 10th of March, 1864.

The plaintiff's writ of *ven. ex.* and *fi. fa.* residue was transferred by sheriff Fortune to the present sheriff on the 9th May, 1864, without any return of what had been done thereon, together with the two writs of *alias fi. fa.* at the suit of the Commercial Bank.

The plaintiff's attorney in this case sent to sheriff Waddell on the 30th of May, 1864, a list of lands to be advertised under the writ of *ven. ex.*, with money to pay for the advertisements; upon which the sheriff inserted in the *Canada Gazette*, on the 18th June, 1864, and also in the "*Cobourg Star*," the said lands, being those before advertised at the suit of the Commercial Bank, to be sold on the 10th September, 1864, under the *ven. ex.*, but not naming any other writ. These advertisements were regularly continued until the 10th of September: the sale was adjourned until the 26th of November, 1864.

On the 29th of August, 1864, the sheriff advertised the same lands, under the *alias* writs of the Commercial Bank, for sale on the 26th of November; and on the 16th day of September following, a rule to return the plaintiff's writ was served on the sheriff on behalf of the plaintiff.

*English* for the plaintiff shewed cause.—The advertisement in the *Star*, the local newspaper, while the plaintiff's writ was in force, and while also the Commercial Bank writs were in force, was a sufficient seizure of the lands, although no advertisement was published in the *Gazette* until after the Commercial Bank writs had expired. This advertisement in the *Star*, although it professed to be at the suit only of the Commercial Bank writs, operated as well to the benefit of all other writs which the sheriff had then in his hands to be executed: *Bank of Montreal* v. *Munro*, 23 U. C Q. B. 419. The advertisement, therefore, was in law a seizure in fact made under the plaintiff's writ. The subsequent publication of the 25th July, 1863, being made while the plaintiff's writ was still in force, was consequently available to the plaintiff's writ, although it professed to be only a publication under the Commercial Bank writs, and although these writs had then run out: *Rowe* v. *Jarvis*, 13 U. C. C. P. 495. Any act, such as taking a list of lands by way of seizure, is a sufficient seizure: *Doe d. Tiffany* v. *Miller*, 6 U. C. Q. B.

426; and the C. L. P. Act, sec. 268, has made no change in the law in this respect: it does declare what acts shall be a seizure, but it does not confine it to these acts only, nor does it assume to alter the law as it stood before. The writ was properly assigned by the old to the new sheriff, which the latter was bound to complete, and the plaintiff was entitled to rule the sheriff to return the writ.

*C. S. Patterson* for the sheriff.—The plaintiff's writ was never properly acted on by the old sheriff. There can be no seizure of lands now but by an advertisement in the *Gazette*, and all the advertisements should be completed before the expiry of the writ, which was not the case as to the plaintiff's writ. And so, also, as the advertisement is the seizure, the discontinuance of the advertisement is an abandonment of the seizure; there should be regular adjournments to preserve the lands in the custody of the law: *McKee* v. *Woodruff*, 13 U. C. C. P. 583; *Muir* v. *Munro*, 23 U. C. Q. B. 189; Impey on the Office of Sheriff, Edn. 1817, fo. 90. The present sheriff should not have been ruled: *The King* v. *The Sheriff of Cornwall*, 1 T. R. 552.

A. Wilson, J.—The plaintiff's writ of *fieri facias* against lands, which issued on the 30th of August, 1861, was in full force by renewal until the 13th of August, 1863. The defendants lands were advertised as seized by publication in a local paper on the 17th of June, 1863, and in the *Gazette* on the 25th of July, 1863: these advertisements did not specify the plaintiff's writ, but described the seizure as having been made upon the writs only of the Commercial Bank. This latter circumstance has been decided to be of no consequence, for, as it is a seizure, it is a seizure under all the writs, according to their priority, which the sheriff has then in his hands to be executed. This may be, perhaps, on the principle, that it is not what the sheriff "declares, but the authority which he has, that is his justification:" *Crowther* v. *Ramsbottom*, 7 T. R. 654.

The advertisements were first made while the plaintiff's writ of *fieri facias* was in full operation: the advertisements were, therefore, in law a seizure under his writ.

The former sheriff, then, on the 29th August, 1863, a few days only after the expiry of the plaintiff's writ of *fieri facias*, returned the writ that he had "lands on hand," &c. This, it is contended, he could not do, in addition to the fact that he had not advertised in the name of this writ specially, because all the necessary advertisements had not been made before the time the writ had expired; but we think there is no force in this objection: a seizure of goods made at the last moment of the operation of a writ against goods would be a valid inception of execution to enable the sheriff to complete the writ after it had expired. It is not necessary that all the advertisements should have been completed of a seizure and intended sale of lands before it could be held that these lands were seized. There are numberless answers to the validity of this objection; but the statute itself is very plainly expressed upon this point: "The advertisement * * * during the currency of the writ * * shall be deemed a sufficient commencement of the execution to enable the same to be completed by a sale and conveyance of the lands after the writ has become returnable." It is the "commencement" of seizure that is the important act, for that commencement is the *seizure;* after that the advertisement is continued, not for the purposes of seizure but of sale, and after that, by reason of such commencement, the execution may be completed by sale and conveyance, "after the writ has become returnable."

We see no objection to the return which the former sheriff has made to this writ of "lands on hand," and we see no other return upon these facts which he could properly have made to it.

The plaintiff upon this return issued the *venditioni exponas* and *fi. fa.* for residue, on the 10th of November, 1863, and delivered it to the sheriff on the 16th of the same month. In strictness it was not necessary, for the mere purpose of a sale of the lands, to issue the *venditioni exponas* at all, as the sheriff could, as well without it as with it, have proceeded to sell the lands then in his hands.

The day of sale, which was fixed for the 12th September, 1863, was allowed to pass without a sale, or an attempt to sell without any adjournment being made of the sale; and so matters remained until the *ven. ex.* was transferred by the old to the new sheriff, on the 9th May, 1864, and until the new sheriff, on the 18th June, thereafter, advertised the lands for sale, under the plaintiff's writ of *ven. ex.*, on the 10th September following: and it is contended that because no sale was made on the 12th September, 1863, the day appointed, and no adjournment was made then of any intended sale, that the whole proceedings by advertisement, and the first result and effects of them, fell utterly through—that the seizure ceased, and the lands were in effect abandoned; but that, as we think, is to confound the preliminaries of a sale with the act, fact, and object of a seizure.

The seizure has been made or has been evidenced by the advertisement: it does not cease to be less a seizure because the sheriff has accidentally omitted to continue the notice that he will sell the lands on a particular day, or because the printer has forgotten to publish it, or because the newspaper or Gazette may, from fire, failure, civil commotion, or any other of the many causes that might be mentioned, been suspended or destroyed. This would lead to the most serious and obvious evils, and would in some of these instances be making superior agency and inevitable accident the offence, rather than the excuse, of the person who was alone injured by it.

The difficulty, no doubt, arises from the fact that the seizure of lands cannot be so visibly and tangibly made as of goods, nor so visibly and tangibly abandoned; and although no positive rule can be laid down as to what shall constitute an abandonment of lands once seized, for it must be a matter of fact arising very much from intention, we are quite satisfied that the non-adjournment of the intended sale on the 12th September, 1863, and the publication of a new and apparently unconnected notice with the former one, made in the June afterwards, are not such facts which constitute necessarily and conclusively an abandonment of the seizure, which was lawfully made under the *fi. fa.*

The plaintiff's writ, it is admitted, was duly transferred to the present sheriff, who advertised under it the lands which had been before seized by his predecessor, as he was justified in doing under section 269 of the act. We do not see why, then, the plaintiff may not call upon the sheriff to return the *ven. ex.*

The present rule should, therefore, be discharged with costs.

Rule discharged with costs.

## COMMON LAW CHAMBERS.

(*Reported by* R. A. Harrison, Esq., *Barrister-at-Law.*)

## EXTRADITION CASE.

### *In re* Bennet G. Burley.

*Extradition of criminal fugitives—Ashburton treaty—Rules for its interpretation—British subjects within the treaty—Charge may be originated in Canada—Acts of war not to commenced or concluded on neutral territory—Where acts admitted matter of defence to be tried in the foreign country—When magistrate bound to commit—Right of judges of superior courts to review decision of magistrate on the evidence—Form of certiorari to bring up depositions—Effect of different charge made in foreign country—Duty of government receiving the fugitive—Form of warrant of commitment—Form of adjudication.*

1. Judges are bound to construe the Ashburton treaty, made between Great Britain and the United States of America for the extradition of fugitives from crime, in a liberal and just spirit, not laboring with legal astuteness to find flaws or doubtful meanings in its words, or in those of the legal forms required for carrying it into effect (per Hagarty, J.)
2. A British subject committing one of the crimes enumerated in the treaty within the jurisdiction of the United States, and afterwards fleeing to Canada, is subject to the provisions of the treaty, which provides for the surrender of "all persons" who being charged, &c.
3. It is not necessary to the jurisdiction of a magistrate in Canada, acting under the treaty and the Canadian statutes passed to give effect to it, either that a charge should be first laid in the United States, that a requisition should be first made by the government of the United States upon the Canadian government, or that the Governor General of Canada should first issue his warrant requiring magistrates to aid in the arrest of the fugitives; in other words, the charge may be originated before the magistrate in Canada.
4. Lawful acts of war against a belligerent cannot be either commenced or concluded in neutral territory.
5. Where the accused, on his examination before the magistrate, admitted the acts charged, which *prima facie* amounted to robbery (one of the crimes enumerated in the treaty), and alleged by way of defence matter of excuse which was of an equivocal character, *Held* that the magistrate could not try the case, but was bound to commit the accused for trial before the tribunals of the foreign country.
6. If the magistrate sitting on a similar charge if committed in Canada would commit for trial, he is equally bound to commit for trial in the foreign country when the offence if any has been committed there.
7. The judges of the superior courts in the country where the fugitive is found may, on a writ of *habeas corpus* and *certiorari*, consider if there was sufficient evidence before the committing magistrate to justify the committal, and so may review the decision of the magistrate on the evidence (per Richards, C. J.; *sed qu.* per Hagarty, J., and John Wilson, J.)
8. The writ of *certiorari* to bring up the depositions cannot properly be issued in vacation, returnable before a judge in Chambers (per Draper, C. J.)
9. The fact that the person is charged with piracy committed in the foreign country, ought not to prevent the government of the country where the fugitive is found surrendering him on the charge made and proved in the latter country (per Richards, C. J.)
10. When surrendered to the government of the country from which he fled, the government of the latter are bound to try him for the offence for which he is surrendered, and not for any other or different offence (per Richards, C. J.)
11. The warrant for committal till surrendered under the treaty need not set out the evidence taken before the committing magistrate, nor show any previous charge made in the foreign country, or requisition from the government of that country, or warrant from the Governor General of Canada, authorising and requiring the magistrate to act.
12. The adjudication of the committing magistrate as to the sufficiency of the evidence for committal may be by way of recital in the warrant of commitment.

[Chambers, January 24-27, 1865.]

A writ of *habeas corpus* was granted on 23rd January last, by Mr. Justice Hagarty, addressed to the keeper of the common gaol of the city of Toronto, commanding him to bring before the presiding Judge in Chambers, Bennet G. Burley.

It was granted upon an affidavit verifying a copy of the warrant of the commitment of the prisoner granted by the Recorder of the city of Toronto on January 20, 1865. To this affidavit were attached a copy of a duly certified copy of the information laid against the prisoner in the United States, and a copy of the warrant for his apprehension issued thereon, which the affidavit states were produced and proved before the Recorder, and that on the argument before the Recorder the prosecutor withdrew that information and warrant from the consideration of the Recorder, though it was objected for the prisoner that the same could not be so withdrawn, as it showed a different charge in the United States, and though the investigation in the Province could only be of the matter charged in the United States, and not of a new charge based on the same circumstances.

The writ was granted also on the petition and affidavit of the prisoner.

The information charged that the prisoner, on the 19th September, 1864, on board the *Philo Parsons*, a vessel belonging in whole or part to Walter O. Ashley, a citizen of the United States, such vessel being then upon the high seas, to wit, upon Lake Erie, feloniously made an assault on the said Ashley, and feloniously put in bodily fear and danger of his life, and one promissory note issued by the Secretary of the Treasury of the United States of the denomination in value of twenty dollars, and in general use as currency, and being the property of the said Ashley and other persons, from the person and against the will of the said Ashley, feloniously did steal, rob, &c., contrary to the Act of Congress, approved April 30, 1790, commonly called the Piracy Act. The warrant set out the foregoing information, and commanded the officer to whom it was addressed to arrest the prisoner to be dealt with according to law.

Upon this *habeas corpus* the prisoner was, on 24th January last, brought before the Chief Justice of Upper Canada at Chambers. The keeper of the jail returned that the prisoner was in his custody upon a warrant of commitment annexed to the writ signed by the Recorder.

The warrant was in the following form:

Province of Canada, City of Toronto, To wit: } To the chief constable and all other constables of the city of Toronto, and Province of Canada, and to all or any of the constables or peace officers within the United Counties of York and Peel, in the said Province,

and to the keeper of the common gaol of the said city of Toronto.

Whereas on the thirtieth day of November, in the year of our Lord one thousand eight hundred and sixty-four, at the city of Toronto, in the Province of Canada, complaint upon oath was made by one Walter O. Ashley, before me, George Duggan, Esquire, then and from thence, hitherto, and still being Recorder in and for the said city of Toronto, charging that Bennet G. Burley, on the nineteenth day of September, in the last mentioned year, on board the steamboat *Philo Parsons*, an American vessel owned by citizens of the United States of America, the said steamboat then being near Kelly's Island, in the waters of Lake Erie, in the State of Ohio, one of the United States of America, and within the jurisdiction of the United States of America, with force and arms in and upon the said Walter O. Ashley did make an assault, and him the said Walter O. Ashley did put in bodily fear and danger of his life, and one promissory note issued by the secretary of the Treasury of the United States of America, of the denomination and value of twenty dollars, and in general use as current lawful money of the said United States of America, and being the property of the said Walter O. Ashley, Simon Fox, Peter Fox, Henry G. Fox, and George L. Caldwell, from the person and against the will of the said Walter O. Ashley, did then and there feloniously and with violence steal, take, rob and carry away; and that the said Bennet G. Burley was at the time of the making of the said complaint in the city of Toronto, in the Province of Canada: and whereas before and at the time of the making of the said complaint upon oath as aforesaid, the said Bennet G. Burley was and still is within the said city of Toronto: and whereas upon such complaint upon oath being made before me as aforesaid, I did, at the said city of Toronto, issue my warrant for the apprehension of the said Bennet G. Burley, so charged as aforesaid, that he might be brought before me at the said city of Toronto: and whereas the said Bennet G. Burley was brought before me at the said city of Toronto under the said warrant, and I have examined upon oath taken before me at the said city of Toronto the said Walter O. Ashley and other persons touching the truth of the said charge, and I have taken the evidence upon oath aforesaid of the said Walter O. Ashley and the said other persons touching the truth of the said charge in the presence of the said Bennet G. Burley: and whereas it is proved before me by the said evidence that the offence so charged in said complaint against the said Bennet G. Burley is and constitutes the crime of robbery in the said United States, where the said offence was committed, the said crime of robbery being one of the crimes mentioned in the Treaty hereinafter mentioned: and whereas the said evidence so taken before me on oath as aforesaid is such as according to the laws of the Province of Canada, and according to the laws of that part of said Province called Upper Canada, would justify the apprehension and committal for trial of the said Bennet G. Burley, the person so accused, if the said crime, of which he is so accused had been committed in the said Province of Canada.

These are therefore to command you, the said chief constable and all other constables and peace officers aforesaid, and each and every of you, and any one or more of you, in Her Majesty's name, forthwith to take the said Bennet G. Burley, and him safely convey to the common gaol aforesaid, and there deliver him to the keeper thereof, together with this warrant, and I hereby command you the said keeper to receive the said Bennet G. Burley into your custody in the said common gaol, and there safely keep him, there to remain until surrendered according to the stipulation of the Treaty between Her Majesty the Queen and the United States of America, for the apprehension and surrender of fugitive felons, signed at Washington on the ninth day of August, in the year of our Lord one thousand eight hundred and forty-two, and recited, or in part recited, in chapter eighty-nine of the Consolidated Statutes of Canada, or until discharged according to law.

Given under my hand and seal this twentieth day of January, in the year of our Lord one thousand eight hundred and sixty-five, at the City of Toronto, in the Province of Canada.

(Signed) G. Duggan,
Recorder of the City of Toronto.

The return having been read and filed, a writ of *certiorari*, tested the 23rd of January, 1864,* was produced, addressed to the Recorder, commanding him to send all informations, examinations, and depositions taken before, or submitted to him, touching the commitment of Bennet G. Burley, charged with robbery or piracy before the Chief Justice of Upper Canada or other of the Justices of the Court of Queen's Bench presiding in Chambers at Osgoode Hall, immediately after the receipt of the writ.

This writ was issued by the clerk of the Court of Queen's Bench, and was tested in the name of the Chief Justice. It was returned under the hand and seal of the Recorder with "all and singular the informations, depositions and evidence had and taken before me against the within named" Burley annexed thereto.

The information was laid by Walter O. Ashley, of the city of Detroit, State of Michigan, one of the United States of America, who swore that on the 19th of September, 1864, on board the steamboat *Philo Parsons*, an American vessel owned by citizens of the United States of America, the same steamboat then being near Kelly's Island, in the waters of Lake Erie, in the State of Ohio, one of the United States of America, and within the jurisdiction of the said United States, one Bennet G. Burley, and one Capt. Bell, with force and arms in and upon one Walter O. Ashley, informant, did make an assault, and him, the said Ashley, did put in bodily fear and danger of his life, and one promissory note issued by the Secretary of the Treasury of the said United States of the denomination and value of twenty dollars in use as current lawful money of the said United States, and being the property of Walter O. Ashley and other persons named, from the person and against the will of the said Ashley did then and there feloniously and by force and violence steal, take, rob, and carry away.

* A clerical error for "1865."

The depositions of Walter Oliver Ashley, of Dewitt Clinton Nicholls, and of Alfred Russell against the prisoner, and of John Murray Price, of Stephen Frick Cameron, of Frank Alfrey St. Lawrence, of John Morrison, of Robert Kennedy, of Wm. L. McDonald, of Arthur S. Barnes, and of Wm. W Cleary, witnesses examined on behalf of the prisoner, were annexed to the writ of *certiorari*.

These depositions shewed that the steamboat *Philo Parsons* was owned by the informant Ashley and other citizens of the United States, that this vessel was a licensed passenger and freight boat, and was plying between the city of Detroit in the State of Michigan, and the city of Sandusky in the state of Ohio, and was accustomed to touch in this route at the Canadian port of Amherstburg, and occasionally at Sandwich, and sometimes at Windsor in Canada. Ashley was clerk on board the steamer. On Sunday evening, the 18th September, 1864, she was lying at the city of Detroit, and the prisoner came on board and said to Ashley that he intended to go down in the morning, that three of his friends were going with him, and requested the boat might stop at Sandwich to take them. Ashley told the prisoner that if he took the boat at Detroit and his party were ready, the boat would call for them at Sandwich. The prisoner came on board the next morning and reminded Ashley of his promise. The boat was stopped at Sandwich, and three persons came on board without baggage or freight. They were well dressed in the "Canadian style." The prisoner said his friends were taking a pleasure trip, and would probably stop at Kelly's Island. At Amherstburg twenty men or more came on board, roughly dressed, and paid their fare for Sandusky. The only baggage taken on board at Amherstburg was a large old trunk tied with cord. In the ordinary course the steamer should have reached Sandusky about five, p.m. Neither the prisoner nor his three friends apparently recognised the men who came on board at Amherstburg. The boat reached Kelly's Island about four, p. m., and proceeded south from the island towards Sandusky, Kelly's Island being in the State of Ohio, and about five miles from the main shore of the United States. After proceeding about two miles three men came up to Ashley drawing revolvers, saying he was a dead man if he offered resistance. Two of them, as Ashley thought, came on board at Sandwich. At this time the prisoner came forward with a revolver in his hand, followed by from twenty-eight to thirty-five men, and levelled the revolver at Ashley, ordering him into the ladies' cabin, where Ashley immediately went, and from which he saw these parties arm themselves from the trunk broughton board at Amherstburg, most of them having two revolvers, and some having hatchets. The prisoner ordered a sulky and some pig iron which was on deck to be thrown overboard, which was partly done. Two men guarded Ashley, and they told him they intended to capture the United States steamer *Michigan*, a war vessel. The prisoner acted as one having authority. His commands were obeyed. Another steamer called the *Island Queen* was seized by the same party at Middle Bass Island, and the passengers were brought as prisoners on board the *Philo Parsons*. A person named Capt. Bell was of the prisoner's party and gave some orders. He told Ashley he wanted him in the office. Ashley went there with him and the prisoner. Ashley requested permission to take off the boat's books. They refused. Ashley then said he had some private promissory notes amounting to about two thousand dollars. The prisoner took them, looked at them, and said he could not collect them, and returned them to Ashley. Bell then said to Ashley "We want your money." He and the prisoner then had revolvers in their hands. Ashley swore he was in bodily fear, but did not consider his life in danger, if he did their bidding. He opened the money drawer. There was very little money there. The prisoner then said "you have got more money; let us have it." Ashley took a roll of bills from his vest pocket and laid it on the desk. Bell took part and the prisoner took part, and they took the money in the drawer (about $10) between them. In the roll of bills taken by them there was a twenty dollar note of the United States, commonly called greebacks, issued by the Secretary of the Treasury. It was in use as lawful current money of the United States at the time. It was legal tender for twenty dollars, and was the property of the owners of the boat. The prisoner took this money, as Ashley swore, against his (Ashley's) will. He was put in bodily fear and danger of his life at the time. Directly after the money was taken Ashley was put on shore at Middle Bass Island by the prisoner and Bell, and the boats steered for Sandusky wiih the *Island Queen* alongside, which last boat was cast adrift in about half an hour. Some of the party said they intended to release the prisoners on Johnson's Island, which is in the State of Ohio, about two miles from Sandusky. The *Michigan* was lying off Johnson's Island, supposed to guard it. There are about three thousand prisoners of war there, soldiers of the Confederate States. Ashley stated there was a rebellion going on by the Southern States. He could not tell how many states. Captain Bell appeared to be in command of the party on board the *Philo Parsons*. He did not say in Ashley's hearing he was in any service, nor for what purpose he took the boat. There were about twenty-five United States soldiers on board the *Island Queen*, who were captured. The passengers were not prevented from taking their baggage. Nicholls confirmed Ashley's testimony in most of the material particulars. He said that Bell came to him in the pilot house, and said he was a Confederate officer, and seized the boat, and took him (Nicholls) a prisoner. But he also said the prisoner seemed to be the leader of them. He did not see the money taken. He heard the prisoner say, when the *Island Queen* was set adrift, that they had cut her pipes, so that she would sink. They had taken every person from on board her. Afterwards the *Philo Parsons* was steered back towards Detroit. Before this, however, it seems that some of the passengers who were made prisoners were put on shore, on the American territory. When, on the return, they had reached the mouth of the Detroit river, some of the party asked Nicholls where they were, and he told them "in Canadian waters;" and some of them said, it was well for some of the vessels near them, or they would board them; and they enquired if a certain

banker did not live at Grosse Isle, in the Detroit river, and being told by Nicholls that one Ives lived there, they replied if it had not been so late they would go and rob him. A short distance above Amherstburgh two men landed in a boat on the Canadian side. At Fighting Island, Nicholls and others, part of the crews of the *Philo Parsons* and *Island Queen*, were put on shore, and the boat proceeded to Sandwich. Nicholls followed her, and in two hours got to Sandwich, and found her there deserted by the whole party, and a pianoforte, a mirror, and some other articles of the furniture belonging to the boat had been landed. Some of Nicholls clothing was also taken away. One of the party wore Nicholls' India rubber coat. The male passengers who were taken were, before they were landed, sworn to keep silent as to the transactions for twenty-four hours. The females were asked to promise to do so, but it was not said in Nicholl's hearing why this was done. When the *Island Queen* was cast adrift, they were about fourteen miles from Johnson's Island as the boat would have gone. When coming up the Detroit river some of the party said they had not made much by coming down. They had intended to take the *Michigan* if they could. They had a Confederate flag, and compelled Nicholls to assist in raising it on the *Philo Parsons*, when the boat was on Lake Erie, returning towards the Detroit river. It was put about half-way up the flag-staff.

The evidence of Mr. Russell proved certain papers or documents which were not returned to the writ of *certiorari*, and were, it is presumed, those which were offered in evidence before the learned Recorder, but to the reception of which the prisoner's counsel objected, and were withdrawn on the part of the prosecution. Mr. Russell stated that he was an attorney and counsellor of the Supreme Court of the United States. He said the offences charged against the prisoner in the United States and now in this Province are the same, and are created by the municipal laws of that country, and are triable in the Erie county court of the State of Ohio, and also in the circuit court of the United States at Detroit. That the crime, if tried in the Erie county court in the State of Ohio, would be robbery, and nothing else; if tried in Detroit would then be the crime of robbery on the lakes. That in his opinion this offence, if tried at Detroit, would be municipal piracy, arising upon the lakes within the territory of the United States, and the offence in such case would be a statutory offence. The crime of robbery, if committed on land within the State of Ohio, could not be tried at Detroit. That if the acts charged here were done by the prisoner and others, claiming to be, or being Confederates, as some of the Southern States people are called since the civil war in furtherance of a hostile design against the government of the people of the United States, these acts might be treated as acts of robbery, and would not merge in the offence of treason. He knew no doctrine of merger as to crimes similar to that in real estate. He would regard as robbery the taking of the money from the party on the boat, although they professed and had civil war objects in view, and although the other acts done were in furtherance of these objects.

On the part of the prisoner, evidence was given that in February and March, 1864, the prisoner was seen in Richmond, in Confederate uniform, wearing a badge of military rank. He was also in Richmond in May, 1863. It was proved that he was born either at Greenock or Glasgow, in Scotland. He was in Canada about the beginning of August, 1864, and also in the month of October following. He had been a prisoner of war in a fort belonging to the United States and had escaped. It was also proved that at Johnson's Island there is a military prison of the United States, and that there are about two thousand six hundred prisoners there, consisting principally of Confederate officers. The witness (Robert Kennedy) stated that he had been a captain in the Confederate States, and had escaped from this prison, and he was aware that an attempt was to be made sometime in September last to release the prisoners; that there is a Federal military force at the Island, and a gunboat called the *Michigan*. That he was in uniform when taken, and was treated, not as a rebel but as a prisoner of war.

Evidence was also adduced to prove the authenticity of the documents hereafter set out. They were received *sub modo* by the Recorder, and were the following:

[COPY.]

"Confederate States of America,
"Navy Department,
"Richmond, Sept. 11, 1863.

"Sir,—You are hereby informed that the President has appointed you an Acting Master in the Navy of the Confederate States. You are requested to signify your acceptance or non-acceptance of this appointment; and should you accept, you are to sign before a magistrate the oath of office herewith forwarded, and forward the same, with your letter of acceptance, to this department. Registered No. The lowest number takes rank.

"S. R. Mallory,
"Secretary of the Navy.

"Acting Master Bennet G. Burley,
"C. S. Navy, Richmond, Va."

On this there was the following indorsement:

"Confederate States of America,
"Richmond, 22nd Dec., 1864.

"I certify that the reverse of this page presents a true copy of the warrant granted to Bennet G. Burley, as an Acting Master in the Navy of the Confederate States from the records of this Department. In testimony whereof I have hereunto set my hand and affixed the seal of this Department on the day and year above written.

(Signed) "S. R. Mallory,
"Secretary of the Navy." [L. S.]

[MANIFESTO.]

"CONFEDERATE STATES OF AMERICA.

"Whereas, it has been made known to me that Bennet G. Burley, an Acting Master in the Navy of the Confederate States, is now under arrest in one of the British North American Provinces, on an application made by the government of the United States for the delivery to

that government of the said Bennett G. Burley, under the Treaty known as the Extradition Treaty, now in force between the United States and Great Britain. And whereas it has been represented to me that the demand for the extradition of the said Bennett G. Burley is based on the charge that the said Burley is a fugitive from justice, charged with having committed the crimes of robbery and piracy in the jurisdiction of the United States; And whereas, it has further been made known to me that the accusations and charges made against the said Bennett G. Burley, are based solely on the acts and conduct of the said Burley in an enterprise or expedition made or attempted in the month of September last (1864), for the capture of the steamer *Michigan*, an armed vessel of the United States, navigating the lakes on the boundary between the United States and the British North American Provinces, and for the release of numerous citizens of the Confederate States, held as prisoners of war by the United States at a certain island called Johnson's Island; And whereas, the said enterprise or expedition for the capture of the said armed steamer *Michigan*, and for the release of the said prisoners on Johnson's Island was a proper and legitimate belligerent operation, undertaken during the pending public war between the two confederacies, known respectively as the Confederate States of America and the United States of America, which operation was ordered and sanctioned by the authority of the government of the Confederate States, and confided to its commissioned officers for execution, among which officers is the said Bennett G. Burley.

"Now, therefore, I Jefferson Davis, President of the Confederate States of America, do hereby declare and make known to all whom it may concern, that the expedition aforesaid, undertaken in the month of September last, for the capture of the armed steamer Michigan, a vessel of war of the United States, and for the release of the prisoners of war, citizens of the Confederate States of America, held captive by the United States of America at Johnson's Island, was a belligerent expedition ordered and undertaken under the authority of the Confederate States of America, against the United States of America, and that the government of the Confederate States of America assumes the responsibility of answering for the acts and conduct of any of its officers engaged in said expedition, and especially of the said Bennett G. Burley, an acting master in the navy of the Confederate States.

"And I do further make known to all whom it may concern. that in the orders and instructions given to the officers engaged in said expedition, they were especially directed and enjoined to 'abstain from violating any of the laws and regulations of the Canadian or British authorities in relation to neutrality,' and that the combination necessary to effect the purpose of said expedition 'must be made by Confederate soldiers and such assistance as they might (you may) draw from the enemy's country.'

"In testimony whereof I have signed this manifesto, and directed the same to be sealed with the seal of the Department of State of the Confederate States of America, and to be made public.

"Done at the city of Richmond, on this 24th day of December, 1864.

"Jefferson Davis.

"By the President,

"J. P. Benjamin, *Secretary of State.*"

The case was, on 24th January last, argued before the Chief Justice of Upper Canada sitting in Chambers, aided by the Chief Justice of the Common Pleas, and Justices Hagarty and John Wilson, representing a majority of the judges of the two superior courts of common law for Upper Canada.

*M. C. Cameron*, Q. C., moved for the discharge of the prisoner, Bennett G. Burley, on the *habeas corpus.*

The Chief Justice directed the return to be read, and the writ and return filed, which was done.

*Mr. Cameron*—The return shows a warrant from the Recorder of the city of Toronto, setting forth an information against the prisoner for robbery, on the oath of Walter O. Ashley, by virtue of which he (the Recorder) had issued his warrant, and had the prisoner brought before him; that the said Walter O. Ashley and other witnesses had been examined before him, in the presence of the prisoner; and that it was proved that the offence was robbery by the law of the United States; and then the warrant sets forth, "That whereas the said evidence [which is not set out] was such as, according to the laws of this Province, would justify the apprehension and committal for trial of the person so accused, if the crime of which he was so accused had been committed in this Province—therefore he commanded the constables, &c., to convey the said Burley to gaol, and required the gaoler to keep him till surrendered, under the provisions of the treaty of extradition, or until discharged by due course of law." This warrant he (Mr. Cameron) submitted was illegal and void, on the grounds,

First.—It did not show that any charge had been made against the prisoner in the United States, nor was it shown that a requisition had been made by the United States Government for the extradition; that one or other of these proceedings was necessary, because the treaty only provided for the extradition of persons charged with the crimes mentioned in the treaty, and the 10th article of the treaty provided that the Government asking the extradition must pay the expense of apprehension, keeping and surrender, and unless some proceding was taken in the States to show that the charge would be prosecuted and the expenses paid, the authorities in this country would be incurring unauthorised expenditure.

Second.—The commitment should have set out the evidence, which it did not do. Under the Act, chap. 89, of the Consolidated Statutes of Canada, passed for carrying the treaty into effect, the magistrate was made judge of the sufficiency of the evidence—the words there being, "And if on such hearing, the evidence be deemed by him [the magistrate] sufficient to sustain the charge according to the laws of this country, he shall," &c. But by 24th Vic., chap. 6, sec. 1, this provision is repealed and the following substituted: "It shall be lawful for such judge or

other officer to examine upon oath any person or persons touching the truth of the charge; *and upon such evidence* as according to the laws of this Province would justify the apprehension and committal for trial of the person accused, if the crime of which he shall be so accused had been committed here, it shall be lawful for the judge or the officer to issue his warrant of commitment" &c. Now, why was this change in the language of the statute made unless to avoid the consequence of the doubt raised by the Court *In re Anderson*, in 11 U. C. C. P. 1, as to their power to review the decision of the magistrate. There was no form of commitment given by the Legislature, and the old practice was to set out on the face of a conviction or a commitment the evidence given; then the warrant should show the evidence, in order that the Court on *habeas corpus* should be able to see whether the evidence was such as by the law of the Province would warrant the committal of the accused for trial.

Third.—The commitment should have shewn an adjudication by the magistrate as to the guilt or innocence of the accused, which it did not, but by way of recital only alleged that the evidence was sufficient to warrant his apprehension and committal. According to the form provided by the English Act 8 & 9 Vic., chap. 120, which commenced like a formal conviction, there was the expression of the magistrate that the accused was guilty of the charge. This Act is not in force in this country; but the form showed the view of the Imperial Legislature as to what the magistrate should find. He referred to *Reg.* v. *Tubbee*, 1 U. C. Pr. R. 103; *In re Kernott*, 1 U. C. Cham. R. 253; the case of the *Chesapeake* in New Brunswick; and *Reg.* v. *Tivnan*, 10 L. T. N. S. 499.

Then as to the merits, he contended that the prisoner claimed that the act charged was committed while engaged in an act of hostility, duly authorised by the Confederate States, against the United States; that this appeared from the evidence on the part of the prosecution in part, and completely in the evidence for the defence. That assuming that the private property of any citizen of a belligerent state was not liable to be seized by an enemy—that such seizure, if made while engaged in an act of war, authorised by the State to which he owed allegiance, or in whose service he was, he would not be liable, criminally, for such excess, but would be amenable to his own State, and the party injured would, perhaps, have a right to call upon the government of the offending party to make compensation; or if the act was not in strict accordance with the usages of war, then he might be punished by the military authorities of the enemy, and denied the right of being held as a prisoner of war, but he could not be held in any manner responsible to the criminal courts of the enemy's country. He contended, however, that when a declaration of war was made by one State against another, it arrayed each individual of the one power against the other, and though civilians were not bound to undertake any act of hostility, yet when the enemy or his property fell into their hands, their duty to their country required them to retain it, and that a commissioned officer was bound by his duty to despoil the enemy; that the *Philo Parsons* became a lawful prize; that it was captured in the waters of the United States, and there was no infraction of any neutrality, but if there had been it was only the neutral power that could complain and not the belligerent enemy—that the boat becoming a prize all on board of it must be regarded in the same light. That on behalf of his client he repudiated the imputation that the expedition was a plundering expedition, and denied that his client was guilty of taking the money at all, the witness Ashley having mistaken the person; that his description of the dress and appearance of the person that he said was the prisoner differed so much from the evidence of Nichols, the mate, that it was manifest they did not clearly know or recognize the prisoner, and the person who took the money was really a different person; but this he (Mr. Cameron) admitted, would be a proper question for the consideration of the jury, and he only alluded to it because his client felt more deeply the imputation that he was guilty of the low, vulgar robbery, as it had been termed, than he did the prospect of being extradited. He contended that if it were admitted for the sake of argument that the parties engaged in the enterprise had violated the right of asylum, and were guilty of a breach of the law of neutrality, they could only be made responsible to the laws of this country; that the offence would only be a misdemeanour for which they could be punished here, and not a felony; and that they could in no manner be responsible either to the civil or military authorities of the United States for so acting. He referred to the following authorities to sustain the position assumed by him in the above points: *The United States* v. *Palmer*, 3 Wheatn. 610; Twiss on International Law, vol. 2, pages 84, 390, 492, 441 and 502; *Brown* v. *United States*, 8 Cranch, 132-3. He also contended that the prisoner, as a British subject, could not be extradited against his own will, as the law did not in express terms apply to the subject of the party affording asylum; that a subject returning to his own country could not be treated as seeking asylum; that that was his place of domicile as a birth-right, and he was entitled to the protection of the law of the country against which he had not offended—crime in a foreign country not being a crime against his own; that the Crown could not by its prerogative or power banish a subject, and it could not by treaty acquire a power that it did not possess before, and as the Act was made merely to carry into effect the provisions of the treaty, it could not be taken as an enactment permitting the expatriation of a subject. That Wheaton laid it down at page 179, "In the negotiation of treaties, stipulating for the extradition of persons accused of crime, certain rules are generally followed, and especially by constitutional Governments. The principal of these rules is, that a State should never authorize the extradition of its own citizens or subjects, or persons accused of political or purely local crimes." That it was lawful for a nation to commission the subjects of a neutral nation, or of the enemy, and that the persons so commissioned had all the rights of the native born subjects of the government granting the commission—Twiss, vol. 2, p. 350. That the law was the same whether the belligerents were independent nations or the sub-

jects of nations engaged in civil war (the case of the *Invisible*, 2 Twiss, page 502). That the language of Blackburn, J., in the case of Tivnan, 10 L. T. N. S. 499, was clear that if the act was a belligerent act the accused could not be tried at all, and the case was not one that could be regarded and decided by the same rules that govern in the time of peace. That here was not the mere right of the accused but of the State he was serving, and to extradite him would be a most flagrant breach of our neutrality, as Her Majesty's proclamation was as much a contract with the South and North respectively as the treaty was with the North, and if one man could be given, then ten thousand might be with equal reason and propriety handed over, and thus the British Government would be most efficiently serving the North by placing within their contro the soldiers of the South.

*S. Richards*, Q C., for the private prosecutor. As to the forms of the warrant and other proceedings, he submitted that they were drawn in strict accordance with the provisions of the act and of the English practice. As to the 2nd and 3rd points, he argued that it is quite sufficient that it appears that the complaint was made here. If our courts had to await such actions in the States before moving, the main object of the treaty, to secure the speedy arrest of suspected persons, would be frustrated. He contended that the word "any" in the treaty, means any person whosoever, and of course it included British subjects, and all others who might commit offences provided for in the treaty. If it were interpreted in any other way in order that British subjects might not be included, it would destroy the effect of the treaty. Mr. Richards then proceeded to review the evidence adduced before the Recorder for the prosecution, from the commencement to the final mooring of the *Philo Parsons* at the wharf on the Canadian side. He argued from the evidence that the strongest possible proof of robbery had been brought against the prisoner; as clear a case as had ever been proved against highwaymen; and consequently the case was strong enough to go to a jury. He then proceeded to show that the Court had no power to review the judgment of the Recorder, but should allow the matter to be decided by the American tribunals. With regard to the belligerent character of the prisoner, he contended he had failed to establish that fact satisfactorily. Warfare must be carried on by the Sovereign of a State, and not by banditti, who upon being arrested would be liable to be executed. As to the document purporting to be a commission, signed by R. S. Mallory, Secretary of the Confederate States Navy, produced by the prisoner to prove that he was a duly commissioned officer in the service of the Confederate States, it had not been legally proved to be genuine, as no person had come forward to testify to their having seen him sign his name to it. Witnesses had stated that they believed the handwriting to be his, but that was not sufficient. He applied the same argument to the manifesto of President Davis, assuming the act of Burley. No person had seen him sign it, but merely believed the signature to be his, which was not sufficient evidence in law. Mr. Richards continued to argue that the robbery committed by the prisoner and those who acted with him was not a belligerent act, or one acknowledged to be such by the law of Christian nations. Under these circumstances the prisoner should be delivered up to the United States, in order that he might be brought before a jury for trial. He was not prepared to say, however, that if it could be proved that the steamer *Philo Parsons* had been seized for the express purpose of assisting the raiders in capturing the United States war steamer *Michigan*, in order that an attempt might be made to liberate the Confederate prisoners on Johnson's Island, that the prisoner should not be tried as a belligerent. But it had not been proved that that was their intention. He also argued that during times of war those engaged in it had no right to make descents upon private citizens and despoil them of their goods.

The Chief Justice said that it might as well be contended that a soldier who took a prisoner in battle had no right to strip him of his clothes in order to clothe the soldier who might have none, and in such a case as that, that the soldier might be tried for robbery, on the ground that such a proceeding would not be a legitimate act of war.

Mr. Justice Hagarty thought that was what the Counsel for the prosecution was endeavouring to show.

*Mr. Richards* said that a soldier belonging to an to an army that was passing through an enemy's country had no right to leave the ranks for the purpose of plundering private citizens, and referred to cases in which the Duke of Wellington had some of his men shot for such acts.

The Chief Justice here remarked that it appeared to him that the case was about to turn on the point whether those holding commissions had a right to commit acts which were not recognized as legitimate acts of warfare by civilized nations; and he asked, who was to decide upon the case?

*Mr. Richards* replied, a jury, as a matter of course. He next proceeded to argue that, according to the ruling of the English courts, belligerent acts could not be originated on neutral territory, and consequently, as the Lake Erie raiders had initiated the attack in Canada, they were not entitled to be treated as belligerent. (*Two Brothers*, 3 C. Rob. 162.) It was absurd to imagine that twenty or thirty men at the most could entertain any idea of capturing the war steamer *Michigan*, and subsequently rescuing the Confederate prisoners on Johnson's Island, when it was known that there was a regiment of United States soldiers there prepared to resist any such attempt. He admitted, however, that an equal number of men might leave Lee's army and operate against the enemy in the neighbourhood of Richmond, and be considered as engaged in legitimate acts of war, because war was known to exist there.

He referred to Wheaton, last edn., part 4, pp. 626, 627; Vattel book 3, cap. 15, s. 226; Wheaton, part 4, cap. 2, s. 8; 3 Phillimore, 145; Halleck, 386. He conceded that the prisoner was a British subject, and so contended that he was bound to shew authority to make war, and whether he had authority or not was a question for a jury. The proof offered that he wore a uniform in Richmond in 1863—500 miles from

Detroit—does not prove his status in Detroit in 1864. The learned counsel next read the copy of Burley's commission, dated 11th Sept., 1863, and argued that it was conditional only, and it was not shewn that the condition had been fulfilled. Besides, he drew attention to the fact that the certificate proving the commission was not under the seal of the Confederate States, but of the Navy Department of that State. He next adverted to the manifesto. If prisoner had a commission, it was only in the navy, and that did not authorise him to make war on his own account. He also argued there was no sufficient proof of the seal to the manifesto, and that the evidence of the handwriting of Jefferson Davis was for the jury. Besides, he contended that the manifesto was not an adoption of the act with which Burley was charged by the robbery of Ashley: (8 Phillimore, 138.) But waiving this he argued there was no sufficient evidence that the expedition ever was undertaken, made or attempted or commenced to capture the *Michigan*, and for the release of the prisoners at Johnson's Island, and the statement of Jefferson Davis that "it had been made known to him," afforded no evidence of the fact, though it was further stated that the operation was ordered and sanctioned by the authority of the Confederate Government, and confided to its officers for execution, of whom Burley was one; and that while the manifesto attempted to assume responsibility for the act, it expressly provided that the officers engaged were enjoined to abstain from violating any of the laws and regulations of the Canadian or British authorities in relation to neutrality, an injunction which was not observed, and so the adoption could be of no avail: (Wheaton, part 4, cap. 2, ss. 4, 5.) There was nothing to show that the taking of the money from Ashley was in aid of the operation. The conduct of the prisoner and those with him was inconsistent with the pretence of their doing a belligerent act. At all events, there was so much doubt about it that the case should be sent for trial, and cannot be tried here. They were no part of an army. They were far from the theatre of military operations. There was not the preparation necessary honestly to attempt the capture of a war vessel having 14 guns, like the *Michigan*. The prisoner must be sent for trial to the foreign country, and we must assume that he will be fairly tried there, and if entitled to an acquittal will be acquitted: (*In re Anderson*, 20 U. C. Q. B. p. 124.)

*Robt. A. Harrison* appeared for the Crown. He would first address himself to the argument that the prisoner, as a British subject, did not come within the treaty.

Chief Justice Draper said he thought it was unnecessary further to discuss that point, as he had made up his mind upon it.

*Mr. Harrison* understood by that that his lordship thought the prisoner was within the treaty. (Chief Justice Draper assented.) Then as to the three objections to the warrant. First, that it was defective, because it did not set forth the evidence upon which the extradition of the prisoner was demanded. Neither the treaty nor the statute gave any form of warrant, and if the judges had no power to weigh the evidence, he (Mr. Harrison) failed to see any reason for setting forth the evidence in the warrant. Mr. Cameron had quoted the Imperial Act, 8 & 9 Vic. c. 121, but that does not require the evidence to be set forth in the warrant, it merely gives the form to be used when the magistrate committed a prisoner, and the Governor was called upon to act on his decision. Next, it was objected to the warrant that it does not show any warrant antecedent to the action of the magistrate. He (Mr. Harrison) would direct the attention of the Court to the fact, that the treaty made no reference to any antecedent authority. By the treaty the magistrates of the respective countries had power to hear evidence and commit. The Imperial Act 6 & 7 Victoria created something that was not in the treaty, and gave colour to the argument of Mr. Cameron; for it provided that it should be lawful for one of Her Majesty's Chief Secretaries of State to require magistrates to act, and thereupon it should be lawful for the magistrates to act. But this statute gave our Legislature power to devise machinery for the purpose of carrying out the treaty, and the judges would remark, that in the recital of our Act, 12 Vic. cap. 19, it was set forth that to require the action of the Governor-General (equivalent to the action of a Secretary of State) before an accused person could be arrested, would, by reason of the delay, enable fugitives to escape, and so defeat the treaty. Then it was contended that it should be shown there was a charge laid in the United States. That point has already received adjudication. (*In re Anderson*, 11 U. C. C. P. p. 63.) In that case Chief Justice Draper said it was plain that the proceedings for the arrest of a party, with a view to his surrender, might be commenced in this Province. Something had been said about a charge laid in the United States which differed from the one here. His learned friend objected to the evidence, and it had been withdrawn. (Mr. Cameron disputed this assertion, and proceeded to read the evidence given before the Recorder by Mr. Russell, the U. S. attorney.) Mr. Harrison contended that this fully bore out his assertion. There was no evidence that a different charge had been preferred, but even if there were, it would not alter the case here, because we had power to initiate proceedings under the statute. The next question was as to the right of the Court to read the evidence taken before the Recorder. On *habeas corpus* the Court may say if there is *any* evidence, but if any, the Court will not weigh it. That was the deliberate decision of the Court in the case of *Emily Munro*, 23 U. C. Q. B. p. 50. In *ex parte Bessett*, 6 Q.B., the court decided that they had no power to look at the evidence to see whether in it there was authority to commit. He referred to Chief Justice Robinson's judgment in the *Anderson* case, 20 U.C. Q.B. 164, &c.; to the language of Crompton, J. in the *John C. Gerity* case, 10 L. T. N. S. 501; and to the *Chesapeake* New Brunswick case, p. 46. But suppose the Court were to look at the evidence, for the purpose of seeing whether the magistrate came to a proper conclusion, the treaty and the statute merely provided that he should receive the evidence of criminality, and not evidence of exculpation. The moment the Court went into this latter, the question of intent was raised, which a jury alone could decide. The learned

counsel had submitted this objection to his honor the Recorder, and he begged to submit it to this Court. He contended that the only evidence the Court could look at was the evidence for the prosecution, because the statute spoke only of evidence of "criminality," and because the statutes spoke of nothing but this particular kind of evidence. The moment the Court went into the consideration of evidence for the defence, they began a trial of fact, to which they were not competent. But did the facts show an act of war or an act of robbery? He started with this axiom, that no use could be made of neutral territory for the purposes of war, and that if any use were made of it for offensive purposes, that was not an act of war. Mr. Richards had shown by authorities that if the act of capture were commenced from neutral territory, there had been no legal capture; that in fact there had not been an act of war.

Mr. Justice Richards.—You must not lose sight of the fact that all that is said on that question is for the purpose of determining what the consequences of that act in a neutral territory are.

*Mr. Harrison.*—But it shewed that under these circumstances, there was not an act of war. If it was, then the responsibility was shifted from the individual to the State. But he contended that these cases of capture decided that where any act was commenced on neutral territory, it was not an act of war. (See *Santissima Trinidad*, 7 Wheaton 288; also 9 Trench 359; *Santa Maria*, 7 Wheaton 490; *Grand Pere*, 4 Wheaton 471; *Diana Astora*, 4 Wheaton 571.) What constitutes an act of war, is a question of law. In this case the prisoner took upon himself the responsibility of shewing that what he did was an act of war. He must do that beyond all question. Now, when a man acted under authority, this other question also arose—did he do so honestly or not? That being settled in the affirmative, we must then find whether the acts he did were acts of war. But the question *quo animo* is peculiarly a question for a jury. (*Reg.* v. *Hare*, 1 Leach C. C. 270; *In re Anderson*, 11 U. C. C. P. 60, Draper, C. J.; *In re Kane*, 11 How. U. S. 110, Catron, J.; *In re Collins* (the *Chesapeake* case) p. 35; Opinions of the Attorneys-General of the United States, 204, 211; *In re Barnett*, 11 L. T. N. S. 488). He (Mr. Harrison) laid down this proposition—that taking property by force from the person of another was robbery. The exception was when it was taken for purposes of war. The Duke of Wellington, when in Spain, hanged men who committed robbery. They were tried by court-martial; but this did not prove that they would not have been amenable to the civil tribunals of the country. Although a man had a commission he might still commit an act of piracy, for he might act dishonestly (*United States* v. *Clintock*, 5 Wheat. 144). It is not enough for those representing the Southern Government to say that such things were done at Savannah and New Orleans by the United States officers. We had to look at these things as neutrals. There was no reason if they did wrong there why we should countenance wrong here. But he (Mr. Harrison) begged again to call the attention of the court to the fact that the moment we got into this discussion, we found ourselves trying a question of fact. Next referring to the manifesto of Mr. Jefferson Davis, the learned counsel contended that it did not prove an antecedent authority; that it merely said an authority for a certain expedition had been given. But accepting it for what it was worth, it said to the prisoner "You must not violate neutral territory." Plainly then, he had exceeded his authority. He was authorized to do a certain act, provided he did not violate neutral territory. But he did violate neutral territory, therefore he was not authorised. Having exceeded his authority, he was a wrong-doer *ab initio*. But however this might be, the laws of war exempted private property. (See *Lucas* v. *Bruce*, 4 American Law Register 98; *Mostyn* v. *Fabrigas*, Cowp. 180). As to the question of ratification, he (Mr. Harrison) contended that the Southern Government could not discharge the prisoner from his obligations. The ratification might make the Southern Government responsible as accessories after the fact, but it could not relieve the prisoner of his responsibility if he had committed a criminal act. The learned counsel concluded by referring the court to the result of *McLeod's* case (6 Webster's Works 247; 25 Wendell 483) to shew that we have no reason to doubt but that prisoner will get a fair trial in the United States, and argued that so long as the treaty existed we are bound to believe he will; for the treaty is based on the confidence which each nation places in the honest and impartial administration of justice by the other.

*Mr. Cameron* briefly replied, and in answer to the remarks of Mr. Richards with regard to the sinignificant force that pretended to attempt the capture of the steamer *Michigan*, said that the number of outsiders who were ready to assist in the enterprise had not been ascertained, and that Mr. Richards appeared to forget that there were also on the island no less than twenty-six hundred Confederate prisoners ready to assist their friends, and that they knew the attempt was about to be made to liberate them. He contended that the belligerent character of the prisoner had been fully proved, and said that the British Government was bound as firmly to uphold the Confederate States in their belligerent rights as it was to carry out the provisions of the Ashburton Treaty with the United States of America. He cited Twiss 441, 442.

Draper, C. J.—Mr. Cameron objected to the sufficiency of the warrant and to the sufficiency of the evidence adduced before the Recorder to justify or sustain the warrant.

As to the warrant, he contended that it ought to set out the evidence upon which it was issued; that it should show that the Governor General authorized and directed the Recorder to take proceedings against the prisoner, or that a proceeding against him had been originated in the United States.

I think none of these objections are sustainable. The authority of the Recorder is derived from and under the second section of chap. 6 of the Provincial statute 24 Vic., which enacts that "upon complaint made upon oath or affirmation (in cases where affirmations can be legally taken instead of oaths) charging *any person* found within the limits of this province with having com-

mitted within the jurisdiction of the United States of America any of the crimes enumerated or provided for by the treaty, it shall be lawful for any (certain judges and officers, among whom is the Recorder) to issue his warrant for the apprehension of the party so charged, that he may be brought before such judge or other officer, and upon the said person being brought before him under the said warrant, it shall be lawful for such judge, &c., to examine upon oath any person or persons touching the truth of such charge and *upon such evidence as according* to the laws *of this Province would justify the apprehension* and committal for trial of the person so accused if the crime of which he shall be so accused had been committed therein, it shall be lawful for such judge or other officer to issue his warrant for the commitment of the person so charged to the proper jail, there to remain until surrendered according to the stipulation of the said treaty, or until discharged according to law, and the judge shall thereupon forthwith transmit or deliver to the Governor a copy of all the testimony taken before him, that a warrant may issue upon the requisition of the United States for the surrender of such person pursuant to the said treaty."

Nothing in this act contained requires that the evidence adduced against the accused should be set forth in the warrant of commitment, and referring to the forms in use or directed by statute to be used in other cases of alleged crime, they do not contain the evidence by which the charge is so far supported as to justify a committal. The form given in the act of the Imperial Parliament 8 & 9 Vic. chap. 121, does not render it necessary; and as to this branch of the question, it states, "forasmuch as it hath been shown to me upon such evidence as by law is sufficient to justify the committal to jail of the said A. B., pursuant to an act, &c., entituled, &c., that the said A. B. is guilty of the said offence." The present commitment runs thus: "And whereas, the said evidences so taken before me upon oath as aforesaid, is such as according to the laws, &c. (following the language of the statute.) I take it that the word "forasmuch" is as much a word of recital as the word "whereas." Each word as used involves the assertion of the fact as recited, and that fact is that such evidence as the law renders necessary has been adduced before the officer issuing the warrant.

The statute itself affords a complete answer to the other objections—for it gives the authority to arrest and commit without the previous intervention of the Governor General and without requiring any previous proceedings in the United States.

Then, upon the sufficiency of the evidence to justify the apprehension and committal for surrender of the prisoner.

Before discussing this, I must observe that I know of no authority—nor of any practice so established as to be deemed recognized as authority—for issuing a writ of *certiorari* in vacation, returnable before a judge in Chambers. The writ is, I believe, one which must be returnable before the court in *banc.* and the form of it, as given in the books, at which I have looked, is always so, and in criminal cases in England it formerly, and I apprehend still, issues only out of the court of Queen's Bench, and is made returnable on a day in term, "before us at Westminster," or "before us, wheresoever," &c. I mention this to prevent this case being drawn into a precedent, so far as I am concerned. No objection is raised by the counsel for the prosecution, and they have discussed the evidence as if regularly brought under consideration. I have no doubt writs of *certiorari* have been issued in a similar form before, in this Province, without objections—but they are not warranted by English practice. The teste of the present writ is also erroneous (1864 for 1865), but the mistake becomes of no consequence.

The first point taken was that it appears that the prisoner is a native-born subject of Her Majesty, and therefore does not come under the extradition treaty, or the statute passed to give it effect. Reference was made on this subject to statute 31 Car. 2, ch. 2, sec. 12. This objection was disposed of during the argument. The statute 24 Vic. is large enough to embrace all persons, subjects, denizens, or aliens, who have committed the crimes enumerated, in the United States and who are found in this Province. It is sufficient to read the 12th section of the 31st Car. 2nd, to see that it can have no application to a proceeding like the present.

It was further objected that the prisoner is proved to be an officer in the service of the Southern Confederacy; that there is an existing state of war between that Confederacy and the United States of America; that this state of war gives rise to, as between the belligerents themselves, certain rights acknowledged by the law of nations, and among them an immunity as regards all acts of hostility done either in the enemy's country or against the lives and property of the enemy's subjects and citizens; that the act charged as robbery was an act done in the prosecution of lawful hostilities—and though committed within the territory of the United States, was not a crime against the municipal laws of that country; that Great Britain has recognised this state of war, and has, by a declaration of neutrality, admitted the existence in each, of those rights which belong to belligerents. Hence it is argued that the judicial authorities of this country cannot treat such acts, as the prisoner is charged with committing under the circumstances, as appearing as crimes such as the extradition treaty was intended to apply to.

Such, concisely stated, I understand, are the grounds of the application for the prisoner's discharge, for the purpose of a decision. I assume, though I do not adjudge, that the evidence is properly before us, and that a decision must be founded upon a careful examination and consideration of the whole of it.

It is established that the alleged state of war exists. The Queen's proclamation puts the question at rest, while it recognizes and declares the obligations arising from the neutrality to be observed by the Queen's subjects towards the belligerents.

Then the particular facts set forward appear to be that the prisoner is a British-born subject, who, by entering into the naval or military service of one of the belligerents has contracted engagements at variance with his proper duty as a British subject. It is asserted on his behalf,

that, having been a prisoner of war, in the United States, he made his escape; he is proved to have been in this province in August, 1864; and in September of that year he was in the city of Detroit, within one of those States in an apparently civil character. While there, and receiving the protection of the laws of that country, he owed, according to our law, a temporary allegiance, and might, by violating it, have been guilty of treason. He cannot, I think, be heard to say that he was not in that situation while living peaceably in Detroit for a greater or less time.

Dressed as a civilian he comes on board an American steamboat, which was engaged in private trade. If he came armed, his weapons were concealed. At his request, the vessel is stopped at a port within British territory, where three other persons come on board and join him. They, too, like himself, appear to be travellers, and were secretly armed, if they were armed. The steamboat touched, in her usual course, at another British port, where twenty or thirty more men in the dress of private citizens, and unarmed, came on board, bringing with them a chest, or trunk, in which, as subsequently appeared, there were fire-arms and hatchets.

When the vessel had proceeded some distance within the United States territory, the prisoner, aided by the parties who came on board from the British territory, seized the steamboat, and then the prisoner and one of his associates, by force and terror, took from Ashley property belonging to him and his co-proprietors of the boat. These parties also took possession of another steamer, from which they removed every person, and took her with them a short distance and cast her adrift, having, it is said, scuttled her. They did not approach Johnson's Island, where the prisoners taken from the Confederate forces were confined, and off which the United States steamer *Michigan* was said to be within some miles, how near not appearing, but turned back towards Detroit and landed on the Canada shore, keeping the property they had taken from Ashley, and removing from the boat some other property belonging to its owners. Some of the parties had declared their intention of capturing the *Michigan* and releasing the prisoners—but these are the acts done by them, while some of them made inquiries and spoke of what they would desire to do, in a manner indicating views of private pillage, other than of warlike enterprise.

But, conceding that there is evidence that the prisoner was an officer in the Confederate service, and that he had the sanction of those who employed him to endeavor to capture the *Michigan* and to release the prisoners on Johnson's Island, the manifesto put forward as a shield to protect the prisoner from personal responsibility, does not extend to what he has actually done—nay more, it absolutely prohibits a violation of neutral territory or of any rights of neutrals. The prisoner, however, according to the testimony, was a leader in an expedition embarked surreptitiously from a neutral territory—his followers, with their weapons, found him within that territory, and proceeded thence to prosecute their enterprise, whatever it was, into the territory of the United States. Thus assuming their intentions to have been what was professed, they deprived the expedition of the character of lawful hostility, and the very commencement and embarkation of their enterprise was a violation of neutral territory, and contrary to the letter and spirit of the manifesto produced.

This gives greater reason for carefully enquiring whether, looking at the whole case, the alleged belligerent enterprise was not put forward as a pretext to cloak very different designs.

Taken by themselves the acts of the prisoner himself clearly establish a *prima facie* case of robbery with violence—at least according to our law. The matter alleged to deprive the prisoner's acts of this criminal character are necessarily to be set up by way of defence to the charge, and involve the admission that the prisoner committed the acts denying their criminality. Assuming some act done within our jurisdiction, which, unexplained, would amount to robbery—if explanations were offered, and evidence to support them were given at a preliminary investigation, the accused could not be discharged—the case must be submitted to a jury. This case cannot, from its very nature, be investigated before our tribunals, for the act was committed within the jurisdiction of the United States. Whether those facts necessary to rebut the *prima facie* case, can be proved, can only be determined by the courts of that country. We are bound to assume that they will try and decide it justly.

I do not, on the whole, think the prisoner is entitled to be discharged.

I should add, that, considering the nature of the questions to be determined, I requested the learned Chief Justice of the Common Pleas, and my brothers Hagarty and John Wilson, who were all, at the moment, within reach, to sit with me and aid me with their opinions. They very kindly complied with my request, and are prepared to express their views. I am sustained by their concurrence in the conclusion at which I have arrived.

Richards, C. J.—I fail to see anything in the statute requiring that the evidence should be set out in the warrant. It says: "Upon such evidence as according to the laws of this Province would justify the apprehension and committal for trial of the person accused, if the crime of which he was so accused had been committed herein, it shall be lawful for such judge or other officers to issue his warrant for the commitment of the person so charged to the proper gaol." The warrant in effect states that the Recorder had examined certain persons on oath touching the charge of robbery, and the evidence was such as according to the laws of this Province would justify the apprehension and committal for trial of the prisoner, if the crime had been committed within this Provinc.

I see no reason why the evidence should be set out in a warrant of this kind more than in any other warrant. If the court before whom the prisoner is brought should require the evidence in order to see if there is enough to justify his committal, they may direct it to be brought before them. If enough be stated in the warrant to show that the Judge had jurisdiction to enquire into the offence, that is all that is necessary. It is not contended that in any other respect the warrant is defective, except in not setting out the evidence or showing an adjudica-

tion as to its effect. The recitals I think sufficiently state the effect of the evidence and the decision of the Recorder thereon.

There is no doubt that under the Imperial statute passed to carry out the provisions of the treaty, very different proceedings are necessary to arrest a person who may have committed a crime in and fled from the United States. The proceedings required by that act had been found to be so inconvenient that it became desirable to substitute other enactments in lieu of the Imperial statute. The preamble of our statute, 12 Vic., cap. 19, refers especially to the inconveniencies of requiring the warrant to issue by the Governor, to signify that a requisition had been made by the authority of the United States for the delivery of the offender, and to require all justices, &c., to govern themselves accordingly, and to aid in apprehending and committing to gaol the person accused, for the purpose of being delivered up to justice, according to the provisions of the treaty. After further declaring it expedient to make provision for carrying the treaty into complete effect within this Province by the substitution of other enactments in lieu of the Imperial Act, the Legislature proceeded to pass the statute of 1849, which was amended by the act of 1861, and by both these enactments the initiatory proceedings to arrest a fugitive from justice from the United States may be taken without any warrant from the Governor.

The effective words of the last Act are that upon complaint, made under oath, charging *any person found* within the limits of this Province with having committed within the jurisdiction of the United States of America any of the crimes enumerated in the treaty, it shall be lawful for any Judge, &c., Recorder of a city, &c., in this Province, to issue his warrant for the apprehension of the person so charged, that he may be brought before such Judge or other officer, and upon the said person being brought before him under the said warrant, it shall be lawful for such Judge, &c., to examine upon oath any person or persons, touching the truth of such charge, and upon such evidence as, according to the laws of this Province, would justify the apprehension and committal for trial of the person so accused, if the crime of which he shall be so accused had been committed herein, it shall be lawful for such Judge or other officer to issue his warrant for the commitment of the person so charged to the proper gaol, there to remain until surrendered according to the stipulation of the treaty, or until discharged according to law, and the Judge, &c., shall thereupon forthwith transmit to the Governor a copy of all the testimony taken before him, that a warrant may issue on the requisition of the United States for the surrender of such person, pursuant to the said treaty.

By the Imperial Statute, on the requisition being made by the authority of the United States, the Secretary of State or person administering the government in any colony of Her Majesty, by a warrant under his hand and seal, is to signify that such requisition has been so made, and to require all justices, &c., to govern themselves accordingly, and to aid in apprehending the person so accused. The act then proceeds —"and thereupon it shall be lawful for the justice, &c., to examine persons under oath touching the truth of the charge, and upon such evidence as would justify the apprehension and commitment for trial of the accused, to issue a warrant for the apprehension of such person, and also to commit the person so accused to gaol, there to remain *until delivered pursuant to such requisition* as aforesaid."

Mr. Justice Richey, in the *Chesapeake* case, whose able judgment I have perused with great interest, decided on the effect of the English statute, which is very different from ours, on this point. By the English Act the requisition is necessary to authorise the warrant of the Secretary of State or Governor, and that warrant is a condition precedent to the issue of a warrant by the justice to apprehend or to commit the party accused, and when committed he is to remain in custody until delivered pursuant to the requisition.

Our statute on the contrary, was intended expressly to render the warrant of the Governor unnecessary; and when the person is committed by the judge, &c., in this Province, he sends a copy of the evidence to the Governor, that a warrant may issue upon the requisition of the United States government for the surrender of such person pursuant to the treaty. It does not necessarily follow from the words of our act that the requisition must precede the arrest or committal of the person accused.

If it were necessary to make the requisition by the authority of the government of the United States before arresting a person who having committed a crime there, flies to this country, he might escape entirely before he could be arrested. The delay in obtaining the requisition might be so great that the criminal would have left the Province, and perhaps this continent, before he could be arrested, though the most clear and positive evidence could be procured on the spot to show that he had committed the offence. I think our Legislature intended to remedy this evil, and that the act they have passed has done so. The provision of the treaty for the payment of the expenses of the apprehension and delivery of the fugitive by the party making the requisition and receiving the fugitive, can be literally carried out by calling on the United States government to pay such expenses when they make the requisition and receive the fugitive. By making the requisition they assume the responsibility of paying the expenses of apprehending as well as delivering him.

I do not see sufficient reason to hold that the arrest or warrant of commitment is bad for not showing a requisition from or on behalf of the United States government for the delivery of the prisoner, as a person charged with the offence. If the evidence shows he has committed the offence under our statute, he may well be committed until surrendered.

This brings me to another objection, that the prisoner was charged in the United States with the offence of piracy, and that he cannot now be committed for the crime of robbery. The charge made in this Province, under which the prisoner was arrested, was robbery. If the requisition on behalf of the United States government be for his extradition for the crime of piracy, I have

no doubt that he cannot be surrendered under the warrant of commitment before us. He may have been guilty of the crime of piracy in the United States, but as this charge is one of robbery, the fact that he was charged with piracy there, cannot prevent his being surrendered for robbery, if such an offence be charged and proved against him here as having been committed there.

When the requisition is made, if his surrender is demanded for any other offence than the one charged against him here, and for which he is committed, as already remarked, it must be refused; and when surrendered, I apprehend that the United States government would, in good faith, be bound to try him for the offence upon which he is surrendered.

As to the merits, I think the judges of the Superior Courts may consider if there is sufficient evidence to justify the committal of the prisoner. The cases referred to by Mr. Cameron are, in my judgment, authority for this point, and the words of the statute of 1861 are more in accordance with this view than those in the act of 1849. By the act of 1849, it is provided, "if on such a hearing, the evidence be deemed sufficient by him (the magistrate) to sustain the charge," he was to commit the offender. Under the act of 1861, the words used are, "and upon such evidence as, according to the laws of this Province, would justify the apprehension and committal for trial of the person so accused," he is to issue his warrant.

I think the right of the court to review the decision of the officer who issues the warrant to the extent I have stated, is sustained by general principles of law as well as by the authorities referred to, and it is one which it is not desirable should be taken away. The sending of any man out of the country under a constitutional government is a grave exercise of power, and ought not to be permitted unless the right to do so is established in the clearest manner. And when this right extends to delivering over any of the Queen's subjects to a foreign power, though charged with a crime, as I am satisfied it does under our statute, it is not going an unreasonable length to assert that the subject has the right to have it placed beyond reasonable doubt that the evidence given to sustain the charge is sufficient, in the judgment of the superior tribunals of the country, to warrant such proceedings being legally taken against him.

As to the ground taken by the prisoner's counsel that he, being a natural born subject of Her Majesty, does not come within the provisions of the treaty, and therefore cannot be surrendered, I think it would manifestly frustrate, in many instances, the object of the treaty, if such a doctrine were allowed to prevail. Suppose any one of the many British subjects domiciled in the United States were to commit the crime of forgery or arson, and then to fly to this country, ought we not to surrender him on proper evidence of his guilt? As we have no means of punishing him here for such an offence, it would seem like affording impunity to crime to say that he should not be surrendered. Then take the case of American citizens domiciled here (though not so numerous a body as British subjects resident in the United States) if they committed any of the crimes in this country mentioned in the treaty, they might equally escape punishment if they could merely pass over what in many parts of the country is an imaginary line. When the intercourse between two countries is so great as between Great Britain and the United States—countries having a common language and laws, and institutions in many respects similar, it may well be considered that the executive governments who negotiated the treaty, and the legislatures which have passed laws giving effect to it, intended what the treaty and those laws affirm, namely, that *all* persons who commit certain crimes in one country, and fly to the other, shall be surrendered on a proper demand, and that *any* persons whose extradition shall be demanded, who shall be found within (the limits of this Province) the territories of Her Majesty, shall be committed to jail, &c., to be surrendered.

Whatever may be considered to have been the general rule in relation to a government surrendering its own subjects to a foreign government, I cannot say I have any doubt, that under the treaty and our own statute, a British subject who is in other respects brought within the law, cannot legally demand that he ought not to be surrendered merely because he is a natural born subject of Her Majesty.

As to receiving evidence on behalf of prisoners against whom charges are made as fugitive offenders, I do not see why the same course should not be pursued as in the ordinary examination of persons charged with offences committed in this Province. In Wise's Supplement to Burn's Justice, edition of 1852, it is recommended that such evidence be taken, if offered. The observations of various judges are therein referred to as recommending it, and the opinion of the present Chief Justice of England, when at the bar, in favor of that course, is given. One ground on which he based his recommendation was that the Imperial Act then in force, relative to duties of Justices of the Peace out of Sessions, similar to our Provincial Statute of Canada, cap. 102, sec. 30 directed the magistrate to take the statement on oath or affirmation of those who know the facts and circumstances of the case, and to put the same in writing. The words of our statute 24 Vic. cap. 6 are, "to examine upon oath any person or persons touching the truth of such charge." This language would, in my judgment, authorize the examination of the prisoner's witnesses as much as that used in the section quoted from the Con. Stat. Can. cap. 102.

It does not follow, however, that because the magistrate receives the evidence of the prisoner he must try the case and decide upon it from the weight of evidence, or in any such view. It may be that the evidence produced will satisfy all parties that the accused is innocent, and it may not be considered as at all favorable to him. After receiving the evidence, the magistrate can then decide whether in his judgment the prisoner ought to be committed for trial or not.

I believe I have expressed my opinion on most if not all of the preliminary questions raised in the discussion of this matter, and the most important one for the prisoner yet remains to be disposed of, viz.: Is there such evidence touching the charge of robbery against the prisoner as would justify his apprehension and committal for

trial if the crime of which he is accused had been committed here?

Taking the evidence adduced against the prisoner, there seems to have been sufficient to warrant his committal. Then, has he shown by evidence what ought to relieve him from the charge?

Assuming, for the present, the position taken by the prisoner's counsel to be correct, that we, as belonging to a neutral nation, who have acknowledged that those who are contending against the recognized government of the United States are belligerents, by such acknowledgment have placed them as to all hostile acts against the United States government in the same position as if they were a recognized government; and, further, assuming for the present, that an enterprise to capture the steamer *Michigan* and release the prisoners confined on Johnson's Island, undertaken by twenty-five or thirty men, would, in the then *status* of affairs on Lake Erie and its vicinity, be a lawful and proper belligerent act, does the evidence on behalf of the prisoner show that he was engaged in such an enterprise?

The facts urged on his behalf, as appearing from the evidence, I understand are these:

That there was a large number of prisoners, between two and three thousand, confined on Johnson's Island, in Lake Erie, at the time the *Philo Parsons* steamer was captured by the party with which the prisoner was said to have been connected.

That the steamer *Michigan* was also stationed in the vicinity of that island.

That two of the party who guarded one of the witnesses told him that they intended to capture the United States steamer *Michigan*, to release their friends on Johnson's Island.

That the passengers of another small steamer called the *Island Queen*, captured by the party, were taken off and put in the cabin of the *Philo Parsons* under guard of armed men. That some of these passengers were United States soldiers. That subsequently the prisoner directed the men having the others in charge to march their prisoners down and put them into the hold, three at a time, and they were marched down under guard and put into the hold.

That when the boat was seized some one remarked they were Confederate States soldiers who were doing it.

That the prosecutor at the time told some of the lady passengers of the boat that she was captured by rebels.

That the pilot of the boat stated that Bell, who was in command of those who seized the vessel, asked him if he was in charge of the *Philo Parsons*, and then stated to him that he (Bell) was a Confederate officer; that he seized the boat and took him (the pilot) prisoner; that he would be obliged to submit to their doings; if not he had arms, producing them, to compel him to do so. That the lady passengers of the captured steamers were put on shore, under a promise that they would not give the alarm for twenty-four hours, and that the male prisoners were sworn to secrecy.

That no other passenger or person on board the steamer than the prosecutor was deprived of money or property, and that the captors acted on the view, that having got the boat as a lawful prize they were entitled to all that belonged to her, money as well as everything else.

That the men were officers and soldiers of, and acting under the orders of, the Confederate government, and that the acts and conduct of the prisoner have been assumed by that government.

And, that they hoisted the Confederate flag on the vessel after she had been captured.

On the other side, it was contended that having shown a taking of the money by force and violence, a *prima facie* case is made out. That so far from the facts set up showing that their enterprise was to capture the steamer *Michigan* and release the prisoners on Johnson's Island, they did not go within ten or twelve miles either of the steamer or Johnson's Island. That there is no reason given, nothing whatever shown, that if they ever really intended to embark in such an enterprise as is suggested, why it was abandoned.

That just before the prisoner or Bell took the money from the prosecutor, the latter asked them to permit him to take some promissory notes which were his private property, amounting to about $2,000; that prisoner asked to see them, and after looking at them said he could not collect them, and gave them back to the prosecutor, and Bell then said, "we want your money," both having revolvers drawn at that time. On being shown a small quantity of money in a drawer, prisoner then said, "you have got more money, let's have it," and prosecutor then took a roll of bills, containing about $90, out of his pocket and laid it on the desk, and Bell took part and the prisoner part—they took the money between them.

That some of the party on guard over the pilot of the vessel, asked him if a banker did not live on Grosse Isle, in the Detroit river. He replied that Ives lived there. They said, if it had not been so late they would go and rob him.

That the clothes of the pilot of the vessel were taken by some of the party, and that he wished one of them who had taken a coat of his to return it, but he refused to do so.

That when they arrived at Sandwich they took some of the furniture of the boat ashore.

That as to hoisting the Confederate flag, that was done after dark, and then only half-mast.

That the evidence to show that the prisoner was an officer of the belligerent power, as he contended he was, was not sufficient, and that the instrument called a manifesto does not show that this prisoner was directed to engage in the alleged enterprise, but rather that it was entrusted to belligerent officers generally, and that prisoner was one of those officers, but not that he was personally directed to undertake or engage in the enterprise. That the assuming of the act is equally equivocal. That the acts and conduct of all the officers engaged in the expedition, and especially those of the prisoner, are assumed, but it is a matter of doubt if they were engaged in the expedition, and they may have put that forward as a pretence, under cloak of which to commit robbery. That the instructions to the officers to undertake the expedition were to abstain from violating any of the laws of this country in relation to neutrality. That the prisoner, and those engaged with him, did not act on those instructions, but in disregard of our

laws, and, under the pretence of being peaceable citizens, embarked on board a vessel of, to us, a neutral friendly power, with concealed arms, and by force captured the vessel, and in violation of the laws of war took from the prosecutor, a private individual and a non-combatant, a considerable sum of money. That this act of robbery was not at all necessary for them in carrying out the alleged enterprise, if they really had intended to carry it out, and therefore, taking the justification set up by the prisoner himself, on the ground put by his counsel, it failed. It was further contended on the part of the prosecution that to attempt to carry on war or commit depredations which are to be dignified with the name of war, by the aid of only twenty-five or thirty men, hundreds of miles away from the scene of military operations, in the interior of the enemy's country, remote from the sea, and to suppose that acts of plunder committed under such a pretence, would ever be considered by neutrals as belligerent acts, was to extend the rule beyond reason, though such acts might have been undertaken under the direction of the belligerent authorities, or afterwards avowed by them.

If, on a similar matter occurring in this country, I were called upon to decide whether I would discharge the prisoner or commit him for trial, I should feel bound to commit him. I should say, looking at all the facts as they are presented on either side, that the conduct of the parties, and what they said and did during the time the vessel was in their possession, was of that equivocal character that it would, in the most favorable view suggested for the prisoner, be a matter for the consideration of a jury whether they were acting in good faith in carrying out a belligerent enterprise, or whether they were not cloaking an expedition for the purposes of plunder under pretence of a belligerent enterprise, thinking in that way more readily to escape detection.

I have no doubt that this is the view that would be taken of the case in England. In the case of *Tivnan and others*, in 10 L. T. N. S. 499, referred to in the argument, Chief Justice Cockburn, after stating that if the acts the prisoners were engaged in were not done with a piratical intent, but with an honest intention to assist one of the belligerents, they could not be treated as pirates, observed: "But then it is not because they assume the character of belligerents that they can thereby protect themselves from the consequences of acts really piratical. Now, here it is true that the prisoners at the time said they were acting on behalf of the Confederates, and that was equivalent to hoisting the Confederate flag. But then pirates sometimes hoist the flag of a nation to conceal their real character. No doubt, *prima facie*, the act of seizing a vessel, saying at the same time it is seized for the Confederates, may raise a presumption of such an intention; but then the circumstances must be looked at to see if the act was really done piratically, which would be for the jury, and I cannot say that the magistrate was not justified in committing the prisoner for trial." Crompton, J., in giving his judgment, said:—"I cannot say that the magistrate, in his discretion, ought not to commit them on the ground that the act done was something like a belligerent act. For looking at the surreptitious way in which the prisoners went on board and took the vessel, there was evidence before the magistrate that this was piracy. Upon this I quite concur with my lord, because it is not for us to weigh the effect of the evidence, which is for the magistrate, and all we can consider is whether there is enough to justify a commital, and I agree with my lord that we cannot say that there is not." In conclusion, he said:—"If, therefore, this was a belligerent act, the prisoners are entitled to our judgment, but if not, and I think it was not, but piracy *contra jus gentium*, in my view the case is not within the statute." Mr. Justice Blackburn said:—"It strikes me that there was such an amount of evidence of its being piracy *jure gentium*, as, if the case had been before a jury, the judge would not have been justified in withdrawing it from them." "As to the evidence, its effect would be for the jury, and though the Confederate States are not recognized as independent, they are recognized as a belligerent power, and there can be no doubt that parties really acting on their behalf would be justified. But the case is one of piracy by the law of nations, in which case men cannot be given up, because they can be tried here, or it is a case of an act of warfare, in which case they cannot be tried at all."

Entertaining the opinion I have expressed, it is my duty to declare that the learned Recorder was warranted in deciding to commit the prisoner for the purpose of being surrendered. As long as the Extradition Treaty between this country and the United States is in force, it ought to be honestly carried out, and in all cases where the evidence shows that an offence has been committed, though there may be conflicting evidence as to the facts, or different conclusions drawn from the facts, yet in those cases where we would commit for trial under a similar state of facts in this country, we are equally bound to commit to be surrendered for trial under the treaty and our statute passed to carry it out. We must assume that parties will have a fair trial after their surrender, or we ought not to deliver them up at all, or rather ought not to have agreed to do so.

In conclusion, I will merely add that if it should be necessary to go into the question how far enterprises, such as it is now contended by the parties who seized the *Philo Parsons* they were engaged in, could properly (under the circumstances attending that seizure in the inland waters bordering on this country and the United States, wholly within the jurisdiction of the two countries) be considered a belligerent act, when undertaken by such an insignificant number of persons, and in the way it was conducted by them, I would require more time to consider and discuss the question than I have as yet been able to give to it.

Hagarty, J.—The evidence against the prisoner shows that a violent act of trespass has been committed on person and property that a man has been robbed within the United States jurisdiction and that the person charged with these acts is found here. The learned Recorder has found that the evidence sufficiently warranted his being arrested and committed to abide the action of the executive under the treaty. We are asked now to

say that there is no evidence legally warranting such action.

On the merits the defence is that the alleged robbery was simply an exercise of a belligerent right in taking money from a prisoner of war—that it was a mere subordinate incident in a lawful act of hostility, viz: the capture of an enemy's vessel on an expedition for the further capture of a war-ship and the release of Confederate prisoners.

In considering this plea I will assume that the documents from Richmond given in evidence are genuine. It becomes most important to consider whether the prisoner when he took Ashley's money was in good faith proceeding on the warlike enterprise in question, or was using it as a pretext to cover vulgar robbery. No act was done nor any attempt made on the United States steamer or the island, nor any reason apparent on the evidence why the alleged design was abandoned. It is consistent with all that appears that the warlike enterprise was a mere pretext and plunder the actual object. On the other hand it may be true that the prisoner was in good faith engaged on the alleged attempt. But would any judge or magistrate hesitate to say to a prisoner urging such a defence under such unprecedented circumstances, "Your defence may, perhaps, ultimately be established. I am not trying you, or deciding finally on your guilt or innocence. A *prima face* crime is proved against you, and I must send you for trial; you can thus try to rebut the presemption arising from your acts." If we decide that this is not enough to warrant his commitment for trial, we assume, I think, a most serious responsibility of holding that the facts in evidence do not disclose any offence—that all the prisoner's conduct was a legitimate act of open war—that the money in the pocket of an unarmed purser of a Lake Erie commercial steamboat was lawful prize of war to twenty or thirty men coming on board in the guise of ordinary passengers at American and Canadian ports, with hundreds of miles intervenvening between them and the nearest spot where their alleged country's flag was flying, or a fellow soldier in arms.

No writer of repute seems to distinguish with a firm hand the point where war ends and murder begins—between lawful prize and petty larceny. Many jurists tell us how they think war should be waged in the light of improved civilization, but seem to shrink from the definition of settled principles governing its conduct. We are not referred to any case at all resembling that before us; it must, therefore, be judged on its peculiar facts.

I hesitate not to state my own opinion that such conduct as the prisoner's, under such circumstances, rebuts any clear conclusion that this was an act of war, and as such protected from the operation of the criminal law, so that the investigating judge should hold that a *prima facie* case was not established fully warranting the placing of the accused on his trial, and then leaving him to his defence, if he can maintain it. I consider the avowal or adoption of the alleged enterprise by the Confederate President as not affecting the duty of the Recorder in dealing with the case. The prisoner can have, I presume, the full benefit of that document on his trial. The alleged assumption of responsibility for his acts by his superiors, is rather a matter between them and the United States than between the latter and us. It might be a dangerous course for a neutral to accept as conclusive from a belligerent power, with whom it has no diplomatic relations, an avowal of acts so very equivocal as those of this prisoner, and so opposed to the ordinary ideas of modern warfare. It was in no way necessary, nor as far as the evidence indicates, conducive to the success of the alleged enterprise, for the prisoner and his friend to take the purser's money. I do not feel pressed by the suggestion of counsel that the United States can equally demand the extradition as a murderer of a Confederate officer or soldier killing a Federal in battle. The mere statement of this case, and the fact that a state of war is admitted to exist, would answer the demand. Either belligerent flying from the pursuit of the other is safe within our border, and no argument can torture his acts done in ordinary warfare (as it is well understood by the common sense of every man, but not so easily defined by reference to international law) into those of a criminal within the Ashburton Treaty.

Had this prisoner been arrested on the wharf in Detroit, as he stepped on board the *Philo Parsons* and avowed and proved his character of a Confederate officer, he would have been in imminent danger of the martial rule applicable to a disguised enemy. Had he been secretly joined there by twenty or thirty persons starting over from the neutral shores of Canada, and then by a sudden assault destroyed some national property, or seized a vessel lying at the wharf and taken the money from the unarmed crew, I think they would, if captured in the act, have great difficulty in maintaining their right to be treated as prisoners of war, with no further responsibility.

In the Russian war I think we should hardly have allowed such a mild character to a like number of Russians coming over stealthily from the friendly shores of Detroit to burn, slay and plunder in Windsor.

All the prisoner's conduct, while within our jurisdiction during this affair, repels the idea of legitimate warfare. A British subject, without the Queen's license and against her proclamation in the service of one of the belligerents, acting in concert with persons leaving her ports on the false pretence of peaceful passengers, to wage war on a friendly power—no act of his raises any presumption in his favor of his being in good faith a soldier or sailor waging war with his enemy.

I think the only just course open to a Canadian court is to decline accepting either the prisoner's statement or his alleged employer's avowal of his acts as conclusive of the proposition that his conduct was war and not robbery—it should accept the evidence offered as establishing a *prima facie* case of guilt sufficient to place the prisoner on his trial and to call for his defence.

The whole burden of proving that the transferring of the money from Ashley's pocket to that of the prisoner and his friend does not bear the complexion, that men of plain understanding must, under the circumstances, attribute to it, must be thrown upon the prisoner.

I think I am bound to construe a treaty so

made between my Sovereign and her ally in a liberal and just spirit, not laboring with eager astuteness to find flaws or doubtful meanings in its words, or in those of the legal forms required for carrying it into effect.

We are to regard its avowed object—the allowing of each country to bring to trial all prisoners charged with the expressed offences. Neither of the parties can properly have any desire to prevent such trial, or to shield a possible offender.

If the position of the case were reversed, and the prisoner had done the acts complained of in this country, and claimed to be a belligerent as against our Sovereign, I think any Canadian judge or magistrate would commit him to trial for robbery, leaving him to plead his belligerent position at his trial for what it was worth.

I have neither the desire nor the right to assume that he will not be fairly tried in the United States. The treaty is based on the assumption that each country should be trusted with the trial of offences committed within its jurisdiction.

I think the prisoner should be remanded on the Recorder's warrant, which I think is not open to any valid exception. Had I differed from the result arrived at by the Recorder, I should then have to consider a doubt more than once expressed whether any judge can review his decision.

John Wilson, J. — The prisoner is charged with robbery, which is "the felonious taking of money or goods of any value from the person of another against his will, by violence or putting him in fear of purpose to steal the same." That he is guilty *prima facie* has not been denied; and being here, his counsel says, 1st. He is a British subject, and cannot be sent beyond the kingdom for trial against his will, and the treaty is not broad enough to include a subject of the Queen. 2ndly. He says he is a belligerent, and claims his right as such; 1st, because he holds a warrant as acting-master in the navy of the Confederate States of America; 2nd, because the seizure of the steam vessel, the *Philo Parsons*, was an act of war undertaken with the intent to liberate certain Confederate prisoners of war, confined on Johnson's Island, near Sandusky, on Lake Erie; 3rd, because the act of robbery charged is at most an excess, and at all events is merged in the higher belligerent act; 4th, because he says that, although he can show no order directing what he did, he has a manifesto signed by the President of the Confederate States assuming the act by these States, and therefore he is not subject to committal for extradition under the treaty and the provisions of the 24th Vic. cap. 6; and lastly, he says the warrant of commitment contains no adjudication that the evidence sustains the charge.

The learned Recorder had equal jurisdiction with the judges of the superior courts of law to commit the prisoner for surrender under the treaty, according to the provisions of our statute to carry it into effect. Strictly speaking, the present application might have been disposed of, by simply examining the warrant under which the prisoner had been committed, to see whether on its face it contained a sufficient charge of crime to justify his detention for extradition.

All the proceedings in this matter are now before us on a writ of *certiorari*, issued irregularly perhaps, but at the instance of the prisoner. It is proper that a case of grave importance should be heard at length, so that all doubt should be removed, and it has been thus heard.

It has been urged that the prisoner, being a British subject, cannot be sent from the Province against his consent for trial in a foreign country, and that the language of the treaty ought not to be so construed as to give this power. In Vattel, book 2, ch. 6, s. 76, it is said, "that since the Sovereign ought not to suffer his subjects to molest the subjects of other States or do them an injury, much less to give open audacious offence to foreign powers, he ought to compel the transgressor to make reparation for the damage or injury, if possible, or to inflict on him an exemplary punishment, or finally, according to the nature and circumstances of the case, to deliver him up to the offended State, to be there brought to justice. This is pretty generally observed with respect to great crimes, which are equally contrary to the laws and safety of all nations. Assassins, incendiaries and robbers, are seized everywhere at the desire of the Sovereign in whose territories the crime was committed, and are delivered up to his justice." But the words of the treaty are "all persons" who shall be charged with any of the crimes mentioned therein shall be surrendered. There can be no doubt but that the words of the treaty include British subjects, for it was made in accordance with the comity of nations, as Vattel shows. A British subject ought to know that when acting contrary to his duty as a loyal subject, in violation of the Queen's proclamation, and against the Foreign Enlistment Act, he is not to be favoured in setting up the commission of any State, far less a State not recognized as a nation, to give him the rights of a belligerent in his own country, to escape the consequences of crime committed in the United States. The evidence returned to us shows *prima facie* that the prisoner committed a robbery in the State of Ohio, one of the United States. But it is answered, first, that he held a commission as acting master in the navy of the Confederate States. The holding of this or any other commission does not authorise him, under an order or *mero motu*, to wage war from a neutral territory on the unoffending and non-belligerent subjects of the country at war with the confederacy whose commission, he holds. The evidence, however, does not prove such a commission, for he fails to show his compliance with its conditions. He says he seized the *Philo Parsons* as an act of war, with intent to liberate the prisoners on Johnson's Island, but for this act he produces no order of any superior officer, and the evidence does not show that he had any such order. He says this robbery was at worst an excess of a belligerent right, which was merged in the principal act Now, what was the principal act of war performed? Under the pretence of being a passenger, he went on board a freight and passenger steamboat at Detroit. As a favor, he requested the master to touch at Sandwich, a British port, to take in three persons as passengers, which was done. The boat proceeded on its regular voyage to Amherstburg, a town in this Province, near the

mouth of the Detroit river, about fourteen miles below Sandwich. Here about twenty men, dressed in the ordinary attire of the farming people of the United States came on board the steamer, with one rough trunk, tied round with a cord, and no other baggage. They were supposed to be citizens of the United States returning to their homes after an absence to escape the draft for the recruiting of their army. The prisoner and his three followers affected no knowledge of the last twenty. The course of the vessel to Sandusky, from the mouth of the river, was south-east. She had to pass a number of islands, the northerly are British, the southerly are American. The boundary line of this Province runs north of the Bass Islands, and thence between Pele Island and Kelly's Island. Johnson's Island is said to be fourteen miles from this Island, and two miles from Sandusky. Nothing occurred to excite suspicion or cause alarm until the boat was clearly within the territory of the United States. Suddenly the prisoner presented a revolver at Ashley, and drove him, at peril of his life, into the ladies cabin. Bell, one of his confederates, overcame the mate in a similar manner. The other twenty, more or less, rushed to their trunk, armed themselves with revolvers and hatchets which it contained, acted under the orders of Bell and the prisoner, and the boat became at once under their control. So far, neither of the leaders declared his reason for this proceeding. It was said by the two men who guarded Ashley, that their object was to liberate the prisoners on Johnson's Island. After some hours the boat landed at Middle Bass Island, having taken possession of a small steamboat, the *Island Queen*. At this island, just before Ashley was put on shore, Bell and the prisoner, with revolvers to enforce the command, demanded his money. After getting what was in his drawer, the prisoner insisted he had more, and Ashley took from his waistcoat pocket a roll of bills, about $80 he supposes, which the prisoner and Bell share between them. In the meantime, the mate with others were in the hold of the vessel, and she sailed. Before day the mate was called upon to sail the vessel for the Detroit river, which was reached about daylight. Enquiry was made as to whether a banker did not live on Grosse Isle, and it was suggested that but for the lateness of the hour they would have robbed him. The course of the vessel was continued up the river in the British channel to Sandwich, where the boat was stopped, some goods taken from it, and then abandoned. The actors in the affair at once dispersed. We are now asked to consider these proceedings, so mean in their inception and so ignoble in their development and termination, as acts of war, and to accord to the prisoner belligerent rights. What is there in all this which constituted the act of war? If the object were to release the prisoners, from all that appears they never were nearer than fourteen miles to Johnson's Island. Was the seizure of this unarmed boat *per se* an act of war?—for it has been argued that the robbery was merged in the higher act. The seizure of the boat, for whatever purpose, was one thing, the robbery of Ashley quite another, and in no way that we see, in furtherance of the design now insisted upon, or at all necessary for its accomplishment. But is not the good faith of the enterprise matter of defence which a jury ought to try? Such a trial can only be had where the offence was committed, and we cannot doubt but justice will be fairly administered there.

We are told that although the prisoner cannot show orders authorizing what he did, he has the manifesto of the President of the Confederate States avowing the act and assuming it, and therefore he is not at all subject to this charge. We accord to the Confederacy the rights of a belligerent, as the United States has done from the day it treated the soldiers of the revolted States as prisoners of war; but there is an obvious distinction between a belligerent act done in obedience to a military order and the recognition and avowal of such an act after it has been done. The one is an act of war, the other an act of an established government. The one is consistant with what Great Britain acknowledges, the other is not. For us judicially to give effect to the avowal and adoption of this act would be to recognize the existence of the nationality of the Confederate States, which at present our Sovereign refuses to acknowledge.

Giving for the moment to this manifesto its full force, it distinctly disclaims all breaches of neutrality; but it is clear that this expedition took its departure and shipped its arms from our port. But does it assume the responsibility of this seizure and all that was done upon it throughout? If not, it is neither justification nor excuse. I see no authority for the doing of the act, and no specific assumption of what was done, therefore the whole justification fails. Lastly, it is objected that the warrant does not charge an offence except by way of recital, and contains no adjudication upon the offence charged.

I think the warrant recites properly the offence charged, and the adjudication is "that the prisoner is, and stands charged with the offence," which is all that is required.

The attitude of the United States towards us is no concern of ours. Sitting here, while peace exists and this treaty is in force, we are bound to give it effect. We can look with no favor on treachery and fraud. We cannot countenance warfare carried on except on the principles of modern civilisation. We must not permit, with the sanction of law, our neutral rights to be invaded, our territory made the base of warlike operations, or the refuge from flagrant crime. Peace is the rule, war the exception of our times. Equivocal acts, criminal in their nature, must be taken most strongly against those who, under pretence of war, commit them.

For these reasons I think the prisoner must be remanded for extradition on the warrant of the earned Recorder.

## CHANCERY CHAMBERS.

(*Reported by* Alex. Grant, Esq., *Barrister-at-Law, Reporter to the Court.*)

### Evans v. Evans.

*Garnishee order—Costs.*

This case (reported in 1 U.C. L.J. N.S. 19) was brought before the full court by way of appeal

from the order made in Chambers, and his Honor V. C. *Spragge* then said, that since giving his judgment, he had conferred with one of the Common Law judges, and had been informed by him that it was now the practice at law to grant the costs of a garnishee application when there was a sufficient fund out of which to pay them; and he accordingly, in conformity with his opinion, as expressed in Chambers, concurred with his Lordship the Chancellor in reversing his previous decision.

Order accordingly.

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### Crawford v. Bradburn.

*Amendment of bill.*

The court will not grant leave to amend a bill, where the proposed amendment would render the bill of a different nature.

This was an application for an order to amend the plaintiff's bill. The facts appear in the judgment.

Spragge, V. C.—The bill as it stands is by a mortgagee against a mortgagor to foreclose, it is now discovered that there was a conveyance by the mortgagor to his son, and the amendment asked is to impeach this conveyance, as void under the 13th Elizabeth, adding the son as a party, and making all the necessary allegations to bring the case within the statute; this seems to me more than a mere amendment, the added party would be the substantial party, and the bill would be of a different nature. See *Smith* v. *Smith*, G. Cooper, 141; Smith's Ch. Pr. 6 ed. 351.

Order refused.

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## INSOLVENCY CASES.

(In the Insolvent Court for the County of Wentworth.)

### Re Stevenson, an Insolvent.

A creditor, although not named in the schedule annexed to the deed of assignment or composition made by the insolvent, may oppose the confirmation of his discharge.

The insolvent should be present when application is made for the confirmation of his discharge. Debts must be proved before the assignee, and not before the judge.

The insolvent applied for a confirmation of the discharge executed by a majority in number of his creditors for sums of $100 and upwards, and representing three-fourths in value of the liabilities mentioned in the statement annexed to the deed of composition executed by him and filed in court.

One James Watson appeared claiming to be a creditor, and to have a right to object to the confirmation of the discharge; his name did not appear in the statement of liabilities prepared by the insolvent, and annexed to the deed of composition. He also contended that the insolvent should be present in order that he might be examined pursuant to sub-sec. 3 of sec. 10.

*Sadleir*, for the insolvent, stated that he disputed the claim of Mr. Watson, and argued that Watson had no right to be heard in opposition to the application: that his claim, if he has one, would not be barred, as sub-sec. 3 of sec. 9 only discharges the insolvent from the liabilities which are mentioned and set forth in the statement annexed to the deed of assignment, or in any supplementary list of creditors, and as his rights are not affected in any way by the discharge, he has no right to be heard in opposition to the application.

Logie, Co. J.—I think the only question is, whether or not Mr. Watson is a creditor; if he is, he has a right to appear and be heard in opposition to this application, although not named in the statement of liabilities annexed to the deed of composition. By sub-sec. 6 of sec. 9 it is provided that "upon such application *any* creditor may appear and oppose the confirmation of the discharge," The right to appear is not limited to the creditors named in the schedule. It *may* perhaps be the case that the insolvent is only discharged from those debts named in the statement annexed to the deed of assignment or composition, but that is not enough; every creditor has an interest in the estate of the insolvent, and a right to participate in any dividends that may be declared, and for that purpose is entitled to prove his account and rank upon the estate, and also to oppose the insolvent's discharge. The only method of proving debts given by the Insolvent Act is before the assignee, under sub-sec. 13 of sec. 5; the judge has apparently only an appellate jurisdiction in respect of the proving of debts.

In this case, on being satisfied by affidavit that a bona fide claim to rank as a creditor is made by Mr. Watson, I shall adjourn this meeting, in order to enable him to prove his debt before the assignee. I think, too, that the insolvent should be present when application is made for the confirmation of his discharge, in order that he may be examined, if any creditor desires to do so.

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### In the matter of Hamilton and Davis Insolvents.

A person summoned as a witness cannot refuse to give evidence respecting his own dealings with the insolvents by alleging that he is a creditor.

T. C. M., a confidential clerk, and manager of the business of the insolvents, was summoned as a witness at the instance of the assignees, by a judge's order granted under the authority of sub-sec. 4 of sec. 10 of the Insolvency Act.

In the books of the estate he appeared as a debtor to a considerable amount, but claimed to be a creditor, alleging that he had a set off exceeding in amount his indebtedness to the estate.

After being examined generally touching the estate of the insolvents, he was asked about his own account, when he objected to produce it, or give evidence respecting his own dealings with the insolvents.

*Sadleir*, for the witness, contended that a creditor has no right to examine another creditor about his claim against the estate until he seeks to prove his account, and to rank upon the estate - that it would be unjust to compel the witness to give such evidence, as his statement might be used against him, while he could not use them in his own favour.

Logie, Co. J.—Under sub-sec. 4 of sec. 10, *any* person may be examined as to the estate or effects of the insolvents, but only on a judge's order granted upon petition; no judge acting in insolvency would allow a witness who claimed to be a creditor to be examined at this stage of the

proceedings touching his own account, unless it appeared to him necessary in the interest of the creditors that he should be so examined. In this case the witness was manager of the business of the insolvents; in the books kept chiefly by himself he appears to be largely indebted to the estate, and his claim, which is in the nature of a set off, arises out of his transactions with the insolvents; and I think it is necessary, in order to ascertain whether the debt apparently due by the witness is an asset or not, that he should answer the question put to him respecting his own account.

The witness then produced his account, and an adjournment was asked for and granted. At the next meeting, before resuming the examination,

Logie, Co. J., said—At the time of granting the adjournment, I was asked to look into the point raised by Mr. Sadleir; I have done so, and I am of opinion that my decision was correct. The cases of *Ex parte Gooldie*, 2 Rose, 330, cited in Deacon & DeGex Bankruptcy Law, 165, and *Ex parte Chamberlain*, 19 Ves. Jr. 481, are in point. In the last case, the Lord Chancellor (Eldon) said, "The Commissioners must proceed with the examination, as, although the witness thinks himself a creditor, he may not be so." *And again*, "The question whether the testimony will be useful or useless is very different from that of the right to examine; what may be the effect is for the commissioners to decide, *but the witness cannot set up the objection.*

## ENGLISH REPORTS.

### Regina v. Robinson and another.

On an indictment for feloniously receiving goods, knowing them to have been stolen, it is unsafe to convict a party as receiver on the evidence of the thief, unless it is confirmed.

On an indictment for stealing and receiving a mixture, it appeared that the thief had stolen two sorts of grain, and then mixed them and sold them to the prisoner:—*Held*, that the latter could not be convicted on such an indictment; and there being no evidence but that of the thief, the Judge would not amend.

[Hertford Crown Court—Spring Assizes, 1864.]

Indictment against one Saunders for stealing, and against Robinson for feloniously receiving. The indictment alleged that Saunders, "one bushel of a certain mixture consisting of oats and peas, the goods of his employer, feloniously did steal, take and carry away;" and that Robinson, "the goods aforesaid, so as aforesaid feloniously stolen, feloniously did receive, he then well knowing the said goods to have been stolen."

Second count, that Robinson feloniously did receive one bushel of a certain mixture consisting of oats and peas, of the goods, &c., which said goods had been stolen, he then well knowing them to have been stolen.

Saunders, the thief, pleaded guilty.

Robinson, the receiver, pleaded not guilty.

*Abel*, for the prosecution.

*Codd*, for the defence.

The prosecutor had known the prisoner Robinson for years and had recently sold him various sorts of corn. Before the theft the prosecutor had missed oats and peas, and his oats were peculiar. On the prisoner's premises, after the other prisoner had been arrested, were found a quantity of mixed oats and peas, and the prosecutor believed the oats were his, but could not positively identify them, mixed as they were. The only other evidence was that of Saunders the thief, who swore that the prisoner asked him to "get" him some corn, and afterwards bought it of him and gave him a shilling for it, and told him to "say nothing about it."

Pollock, C. B., advised the jury to acquit the prisoner; it being perilous, he said, to convict a person as receiver on the sole evidence of the thief. This would put it in the power of a thief from malice or revenge to lay a crime on anyone against whom he had a grudge. And here there was no adequate confirmation of the thief's evidence.

The jury, however, after consideration desired to return a verdict of guilty.

Pollock, C. B., however, declined to receive it or allow it to be recorded, and directed them to find the prisoner not guilty, as the evidence failed in point of law. The indictment charged a receiving of a mixture which had been stolen, knowing it, *i e.* the mixture, to have been stolen; but the evidence of the thief, if believed at all, was that he stole pure oats and pure peas, and then mixed them and afterwards sold them to the prisoner, so that the one prisoner did not steal a mixture, and the other did not receive, as the indictment alleged, a "mixture" which had been stolen, for the mixture had not been stolen.

The jury, however, still declined to return a verdict of not guilty, declaring that they deemed that when the thief mixed the oats and peas it became a "mixture."

Pollock, C. B., with some firmness, told the jury that they were bound, on his direction in point of law, to return the verdict he directed. He explained that the facts only were within their province, the law was in his; and although he did not infringe on their province, he could not permit them to invade his. He peremptorily directed them, therefore, to return a verdict of not guilty.

The jury, after some hesitation and with great reluctance, at length, accordingly, returned a verdict of not guilty.

## GENERAL CORRESPONDENCE.

### *Calls to the Bar — Improvement of the Profession.*

To the Editors of the Law Journal.

Gentlemen,—Will you allow me to trespass on your space to make a few remarks as to the letter of "A Barrister," in the first number of your new and very convenient edition of your valuable paper.

I am not satisfied myself that our Law Society has shown quite enough pluck in dealing with some of the black sheep of our profession. No doubt their duty in this respect is very difficult, and requires great judgment for its proper discharge, but it is one of

most vital importance to us, and such an independant body as they are should act fearlessly, if necessary, in discharging it. They should ever remember, that the care of the profession is the most important trust confided to them.

As to numbers, a reasonable premium on articles will at once reduce the increase in that respect, so we have the remedy in our own hands. I believe the examinations reasonably good, if rigidly exacted, but no stipulations as to the amount of knowledge required are of any value unless they are acted up to strictly. The great advantage, to my mind, of the premium system is, that it will prevent a great many from entering the profession who are so utterly without means as to be unable to resist the great temptations offered them in a profession like ours. The question with these poor young fellows, after they are once floated in the profession, is one of *existence*. The fees, if proper ones only are charged, are low enough now, but they must get a living, and, if it can only be obtained by cutting down, that course must be resorted to. "Cutting down" is dishonorable, and dishonorable conduct in one of our profession, not only reflects disgrace upon the whole of us, but utterly does away with all hope of unity among us, as we can place no confidence of any kind in a man who is not aware of what honour is. When he has once set at nought the good opinion of his fellows in this respect, where is he to stop! He has forsaken the only guide to a respectable and respected career, and all hope of the position of the profession being upheld by him is at an end. With a premium system we should have no lack of good men. We don't want men without the education, and, as far as is possible, the habits of gentlemen, and young men of promise could easily obtain the money, either by their own exertions or through their friends. Besides this, by lessening the numbers it must be remembered that we should make the business more valuable to those in the profession, and consequently the inducements to enter it greater even in a pecuniary point of view. I will not intrude on you at greater length at preset, but remain,

Your obedient servant,

A Barrister.

February 7, 1865.

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[We publish most gladly the communication of our valued correspondent, in the hope that owing to suggestions thus made and thus published, those who have the power and upon whom rests the duty of promoting the welfare of the profession, will be thereby guided to a right conclusion.—Eds. L. J.]

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*Garnishee costs.*

To the Editors of the Law Journal.

Gentlemen,—The case of *Evans* v. *Evans*, in Chambers in Chancery, is of so much importance to suitors that I hope you will allow me to make a few remarks on it.

One might have hoped that a Judge in Chancery would have acted upon as well as taken a more equitable view of the question, as to allowing plaintiffs their costs in these cases, but as the Vice-Chancellor says, that court is bound by the decisions of Courts of Law, and we are remanded back to those courts for redress. I beg to suggest, through you, that the whole profession should unite in endeavouring to obtain an alteration of the law as at present acted upon in these cases. The present decision was made by the late Chief Justice Robinson in 1857, in Chambers. It does not appear whether there was any argument on the point or no, but the order for the judgment creditor to be allowed his costs was refused, "on the ground that this is a special provision for the accommodation of the creditor, and therefore it is sufficient for him to receive the designed benefit by paying for it. A judgment creditor is not entitled to put the debtor to additional cost by availing himself of a special provision of this kind instead of pursuing the ordinary method."

No one has more respect for any decision of the late Chief Justice than I have, but I submit that he has taken an utterly erroneous view of the duties of the court in this respect. He says that "this is a special provision for the accommodation of the creditor and therefore it is sufficient for him to receive the benefit by paying for it." But what benefit does he receive if he is absolutely prohibited from availing himself of this accommodation. And yet this occurs every day. A judgment debtor goes away to the States leaving nothing collectable behind him but a consiberable number of small debts, collectable only in the Division Court. The unfortunate creditor cannot discover all these debts at once so as to include

them in one order, and of course is not justified in delaying to secure the debt that he does know of till he has sufficient information as to the rest, so he is obliged to take out a number of successive orders—the expense of which probably amounts to nearly as much as the sums collected. This may, and probably does occur every day, and why are our Judges to say to the plaintiff, "Although yours is a just debt, and we give you full credit for having done no more than your duty to yourself in trying to collect it—and that by the only means in your power—and although it is wholly owing to the conduct of the defendant that you have been obliged to incur this expense, we leave you to pay the whole of it, even though it should exceed the amount collected."

We lawyers are not interested in it, because if we are called upon to act for the plaintiff we get our costs at any rate, and therefore are free from any charge of selfishness in urging this question, so let us see what the Statute says upon the subject.

Section 299 of the Common Law Procedure Act says, "The costs of any application for an attachment of debt under this Act, and of any proceedings arising from or incident to such application, shall be in the *discretion* of the court or judge." And yet what is the effect of all our courts and all our judges acting upon this decision, but to say, "It is true that the law expressly vests in us a discretion in each and all of these cases, but the late Chief Justice refused relief in *one* case, and therefore we set aside the words of the Act and refuse to exercise any discretion in *any* case for the future."

Hoping that our courts will be moved at some very early period to take a different view of their duty in this matter,

I remain, your obedient servant,

AN ATTORNEY.

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[There is much force in the argument of "An Attorney." We have always felt with him that proper effect has not yet been given to sec. 299 of the Common Law Procedure Act. It is not usual to grant an order for the attachment of debts till the ordinary remedy by execution has failed to produce fruit. And to whom is the blame to be attributed for this result? Certainly not to the plaintiff. He has the *right* to realize the amount of his judgment, and when using the proper and necessary remedies in that behalf it is not fair that he should be obliged to pay nearly as much for the remedy as his claim is worth. Our correspondent will find, however, upon reference to another column, that the decision in *Evans* v. *Evans* has been reversed, and that the Court of Chancery has, very properly, placed the interpretation contended for by him upon the section referred to.—EDS. L. J.]

## MONTHLY REPERTORY.

Q. B. ECHLIN v. BRADY.

*Crim. Con.—Staying action till particulars given —Novel application.*

In an action of *crim. con.* application was made on behalf of defendant to stay the action till plaintiff should give the particulars of the times and dates when the alleged criminal conversation took place with plaintiff's wife. The declaration was in the common form: The defendant's affidavit stated that he entirely denied the allegations, and had no idea or knowledge of the times and places when the alleged *crim. con.* took place, and that it was necessary for his defence that he should have intimation of particulars referred to. The Court was unanimous in refusing a rule. (9 S. J. 241.)

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C. P.

FOY ET UX. v. LONDON B & S. C. R. W. Co.

*Railway — Negligence — Injury to passenger.*

When a train, in which A. was a passenger, stopped outside a station, at a place where there was no platform, A. was told by one of the railway porters to get out as soon as she could; and instead of stepping on the two steps of the carriage in succession, and from the lower one to the ground, she took a gentleman's hand and jumped from the top one and was injured; it was held by the court that there was evidence of negligence to go to the jury; and the jury having given a verdict for the plaintiff, the court refused to interfere. (13 W. R. 293.)

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EX. BAKER v. LANE.

*Interrogatories—Libel.*

Interrogatories in an action of libel disallowed on the ground that the answers would tend to criminate the party interrogated. (13 W. R. 293.)

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D. & M. RE MULOCK.

*Letter threatening a suitor—Contempt of Court.*

An attempt by a third person to prevent a suitor from laying his case before the court, by threats of bringing him into disgrace and disrepute, is a contempt of court, and subjects the offender to a heavy fine. (13 W. R. 278.)

## DELIVERY OF JUDGMENTS.

Judgments will be delivered in the Queen's Bench on Monday, the 6th March next, at 10 o'clock, a.m., and on Saturday, the 11th March, at 2 o'clock, p.m. In the Common Pleas, on Monday, the 6th March, at 2 o'clock, p.m., and on Saturday, 11th March, at 10 o'clock, p.m.

## SPRING CIRCUITS, 1865.

### The Hon. Mr. Justice Morrison.

| | | |
|---|---|---|
| Kingston | Tuesday | 21st March. |
| Brockville | Tuesday | 4th April. |
| Perth | Monday | 10th " |
| Cornwall | Monday | 17th " |
| Ottawa | Tuesday | 2nd May. |
| L'Orignal | Tuesday | 9th " |

### The Hon. Mr. Justice Wilson.

| | | |
|---|---|---|
| Napanee | Monday | 20th March. |
| Picton | Wednesday | 22nd " |
| Belleville | Monday | 27th " |
| Whitby | Tuesday | 11th April. |
| Cobourg | Monday | 17th " |
| Peterborough | Monday | 1st May. |
| Lindsay | Thursday | 4th " |

### The Hon. Chief Justice of Upper Canada.

| | | |
|---|---|---|
| Milton | Monday | 13th March. |
| Hamilton | Monday | 20th " |
| Barrie | Monday | 3rd April. |
| Niagara | Tuesday | 25th " |
| Welland | Tuesday | 2nd May. |
| Owen Sound | Tuesday | 9th " |

### The Hon. Mr. Justice Hagarty.

| | | |
|---|---|---|
| Guelph | Monday | 29th March. |
| Brantford | Monday | 27th " |
| Berlin | Monday | 3rd April. |
| Stratford | Monday | 10th " |
| Woodstock | Monday | 17th " |
| Cayuga | Tuesday | 25th " |
| Simcoe | Tuesday | 2nd May. |

### The Hon. Mr. Justice John Wilson.

| | | |
|---|---|---|
| Goderich | Tuesday | 21st March. |
| Sarnia | Monday | 27th " |
| St. Thomas | Thursday | 30th " |
| London | Monday | 3rd April. |
| Chatham | Wednesday | 12th " |
| Sandwich | Monday | 17th " |

### The Hon. Chief Justice Richards.

| | | |
|---|---|---|
| Toronto City | Monday | 20th March. |
| York and Peel | Monday | 10th April. |

## INSOLVENTS.

| | |
|---|---|
| P. S. Stevenson | Toronto. |
| Charles J. Houghton | Montreal. |
| Charles Larocque | Plantagenet. |
| A. Bunnell | Brantford. |
| Pierre Elzear Pothier | Three Rivers. |
| Peter Aylsworth | Demorestville. |
| Thomas Redner | Tp. Hillier. |
| David Caldwell | Galt. |
| Thos. Mahoney | Peterboro'. |
| John Young | Montreal. |
| W. Muirhead | Hamilton. |
| John W. H. Schneider | Welland. |
| Wollaston F. Pym | Cobourg. |
| James M. Swetman | Huntingdon. |
| John C. Taylor | Belleville. |
| John Taylor | Co. Wentworth. |
| William Douglas & Co. | Montreal. |
| Arthur Macbean | Cobourg. |
| William Rice | Perth. |
| Charles Latour | London. |
| Holmes & Davidson | Point Levi. |
| J. Craig | Brantford. |
| Henry Nicoll | St. Thomas. |
| Cornelius Mitchell | St Thomas. |
| David P. Beattie | Montreal. |
| Alexander F. Beattie | Strathroy. |
| Godard & Co. | Grafton. |
| William Coyne | St. Thomas. |
| Clark Gordon | Sherbrooke. |
| J. Livingston | Montreal. |
| Archd. McNeil | Centreville. |
| Hubert Gravel, sen. | Montreal. |
| B. Sinotte | Montreal. |
| John Ashton | St. Hyacinthe. |
| Samuel Ashton | Darlington. |
| James McGuire | Cartwright. |
| Robert Evans | Kingston. |
| John Orr | Hamilton. |
| Gurd & Tarlton | Calnsville |
| T. & D. Brown | Montreal. |
| Turnbull Brodie & Co. | Montreal. |
| Paul T. Ware | Montreal. |
| Owen Murphy | Toronto. |
| Marois & Son | Quebec. |
| Wm. B. Whittier | Quebec. |
| Henry Snider | Picton. |
| John Tees | Picton. |
| D. A. P. Watt | Montreal. |
| Noble C. Smith | Newtonville. |
| James Creed | Tp. Barton. |

## APPOINTMENTS TO OFFICE.

### SPECIAL COMMISSIONER.

FREDERICK WM. TORRANCE, of Montreal, Esquire, Advocate, to be a Commissioner under Chapter 13 of the Consolidated Statutes of Canada, to inquire into the proceedings connected with the St. Alban's offenders. (Gazetted January 28, 1865.)

### NOTARIES PUBLIC.

WILLIAM U. BARRETT, of Port Hope, Esquire, Attorney-at-Law, to be a Public Notary in Upper Canada. (Gazetted January 21, 1865.)

### CORONERS.

JOHN GEORGE McLEAN, Esq., M.D., Associate Coroner, County of Lincoln. (Gazetted January 21, 1865.)

JOHN H. ELLIOTT, Esquire, M.D., Associate Coroner, County of Welland. (Gazetted January 21, 1865.)

### ISSUERS OF PASSPORTS.

A. J. PETERSON, of Berlin, THOMAS WILLS, of Belleville, THOMAS SPARROW, of Galt, SAML S. SMADES, of Port Colborne, and THOMAS BURGAR, of Welland, Esqrs. (Gazetted January 7, 1865.)

MOSES SPRINGER, of Waterloo, THOMAS GORDON, of Owen Sound, JAMES McGIBBON, of Lindsay, and JAMES HOLDEN, of Prince Albert, Esquires. (Gazetted January 21, 1865.)

ANDREW DONNELLY, of Richmond, WILLIAM B. HAMILTON, of Collingwood, CHARLES ELLIOT, of Cobourg, WILLIAM WALLACE, of Simcoe, WILLIAM M. KING, of Oakville, LEWIS W. ORD, of Seaforth, JAMES THOMSON, of Goderich, and JAMES RIDDELL, of Port Dover, Esquires. (Gazetted January 28, 1865.)

## TO CORRESPONDENTS.

"A Barrister"—"An Attorney"—under "General Correspondence."

## DIARY FOR MARCH.

1. Wed ... *Ash Wednesday. St. David.*
5. SUN ... *1st Sunday in Lent.* [for County Court.
6. Mon ... Recorder's Court sits. Last day for notice of trial
12. SUN ... *2nd Sunday in Lent.* [for York & Peel.
14. Tues ... Qr. S. & Co. Ct. sit. in each Co. Last day for ser.
16. Thur... Sittings Court of Error and Appeal.
17. Frid.... *St. Patrick.*
19. SUN ... *3rd Sunday in Lent.*
24. Frid.... Declare for York and Peel.
25. Sat .... *Lady Day. Annunciation V. M.*
26. SUN ... *4th Sunday in Lent.*

## NOTICE.

*Owing to the delay that has unavoidably taken place in the issue of the January number and of this number of* Law Journal *and* Local Courts' Gazette, *the time within which payments must be made to secure the benefits of* cash *payments is extended to* 1st *April next.*

*Owing to the very large demand for the* Law Journal *and* Local Courts' Gazette, *subscribers not desiring to take* both *publications are particularly requested at once to return the back numbers of that one for which they do not wish to subscribe.*

THE

# Upper Canada Law Journal.

MARCH, 1865.

## EXTRADITION OF CRIMINALS.

Jurists are divided upon the question, how far a sovereign state is, independently of treaty obligations, bound to deliver up persons charged with crime committed in another state, upon the demand of the foreign state.

Some writers maintain the doctrine, that according to the law and usage of nations, every sovereign state is obliged to refuse an asylum to individuals accused of crimes affecting the general peace and security of society, and whose extradition is demanded by the government of that country within whose jurisdiction the crime was committed.

Others, maintain that the extradition of persons accused of crime, independently of treaties, is not a matter of obligation but of comity, and they refer to the fact of the existence of so many special treaties respecting this matter, as conclusive evidence that there is no general usage among nations, constituting a perfect obligation and having the force of law, properly so called (see Wheaton's International Law, 6 Edn., p. 176).

The opinions expressed by eminent jurists in the English House of Lords, respecting the extraditon treaty with France, is strong to show that the law of England does not recognize the obligation of the British Government to surrender fugitives accused of crime committed in foreign countries, in the absence of a treaty or statute providing for and authorizing the same (per Macaulay, C. J., in *Regina* v. *Tubbee*, 1 U. C. Pr. R. 102, 103).

Such also is the doctrine which, at an early period, was maintained by the Government of the United States, and has since been confirmed by judicial authority in the American Courts of Justice, both State and Federal (see Wheaton's International Law, 177).

This being so, the necessity of a treaty on the subject between the Governments of Great Britain and the United States, was felt at a very early date. The first treaty between these two great powers, was made on 19th November, 1794, commonly called "Jay's Treaty" and related only to criminals accused of murder and felony, but as it has long since been superseded it is unnecessary to say more about it. The next was that commonly called the Ashburton Treaty, or Treaty of Washington, signed at Washington on 9th August, 1842, by Lord Ashburton on behalf of the British Government, and Daniel Webster on behalf of the Government of the United States. The ratifications were exchanged at London on 13th October following. It relates to many subjects besides the giving up of fugitive criminals from justice, but with the latter only are we at present concerned.

The tenth article reads as follows: "It is agreed that Her Britannic Majesty and the United States, shall upon mutual requisitions by them, their ministers, officers or authorities respectively made, deliver up to justice all persons who being charged with the crime of murder or assault with intent to commit murder, or piracy, or arson, or robbery, or forgery, or the utterance of forged paper committed within the jurisdiction of either, shall seek an asylum or shall be found within the territories of the other; provided that this shall only be done upon such evidence of criminality as according to the laws of the place where the fugitive or person so charged shall be found, would justify his apprehension and commitment for trial, if the crime or offence had been there committed, and the respective judges and other magistrates of the two governments, shall have power, jurisdiction and authority upon complaint made under oath, to issue a warrant for the apprehension

of person so charged, that he may be brought before such judges or other magistrates respectively, to the end that the evidence of criminality may be heard and considered, and if on such hearing the evidence be deemed sufficient to sustain the charge, it shall be the duty of the examining judge or magistrate to certify the same to the proper executive authority, that a warrant may issue for the surrender of such fugitive. The expense of such apprehension and delivery, shall be borne and defrayed by the party who makes the requisition and receives the fugitive."

It is provided by the eleventh article of the treaty, that the tenth article shall continue in force until one or other of the parties shall signify its wish to terminate it, and no longer.

No sooner was this treaty ratified than it was deemed necessary for each of the contracting parties to have legislation, for the purpose of carrying into complete effect the agreement, as to the render of fugitive criminals from justice.

The English Legislature, on the 22nd August, 1843, passed the 6 & 7 Vic., cap. 76, intituled "An Act for giving effect to a treaty between Her Majesty and the United States of America, for the apprehension of certain offenders. It first recites the tenth article of the treaty. It next recites the expediency that provision should be made for carrying the agreement into effect, and then provides:

"That in case requisition shall at any time be made by the authority of the said United States, in pursuance of and according to the said treaty, for the delivery of any person charged with the crime of murder, or assault with intent to commit murder, or with the crime of piracy, or arson, or robbery, or forgery, or the utterance of forged paper, committed within the jurisdiction of the United States of America, who shall be found within territories of Her Majesty, it shall be lawful for one of Her Majesty's principal secretaries of state, or in Ireland for the chief secretary of the Lord Lieutenant of Ireland, and in any of Her Majesty's colonies or possessions abroad for the officer administering the government of any such colony or possession, by warrant under his hand and seal to signify that such requisition has been so made, and to require all justices of the peace and other magistrates and officers of justice within their several jurisdictions to govern themselves accordingly, and to aid in apprehending the person so accused, and committing such person to gaol, for the purpose of being delivered up to justice according to the provisions of the said treaty; and thereupon it shall be lawful for any justice of the peace, or other person having power to commit for trial persons accused of crimes against the laws of that part of Her Majesty's dominions in which such supposed offender shall be found, to examine upon oath any person or persons touching the truth of such charge, and upon such evidence as according to the laws of that part of Her Majesty's dominions would justify the apprehension and committal for trial of the person so accused if the crime of which he or she shall be so accused had been there committed it shall be lawful for such justice of the peace or other person having power to commit as aforesaid, to issue his warrant for the apprehension of such person, and also to commit the person so accused to gaol, there to remain until delivered pursuant to such requisition as aforesaid."

It enacts "that in every such case, copies of the depositions upon which the original warrant was granted, certified under the hand of the person or persons issuing such warrant and attested upon the oath of the party producing them to be true copies of the original depositions, may be received in evidence of the criminality of the person so apprehended."

"And further, that upon the certificate of such justice of the peace, or other person having power to commit as aforesaid, that such supposed offender has been so committed to gaol, it shall be lawful for one of Her Majesty's principal secretaries of state, or in Ireland for the chief secretary of the Lord Lieutenant of Ireland, and in any of Her Majesty's colonies or possessions abroad for the officer administering the government of any such colony or possession, by warrant under his hand and seal to order the person so committed to be delivered to such person or persons as shall be authorized in the name of the said United States to receive the person so committed, and to convey such person to the territories of the said United States, to be tried for the crime of which such person shall be so accused, and such person shall be delivered up accordingly, and it shall be lawful for the person or persons authorized as aforesaid to hold such person in custody, and take him or her to the territories of the said United States, pursuant to the said treaty; and if the person so accused shall escape out of any custody to which he or she shall be committed, or to which he or she shall be delivered as aforesaid, it shall be lawful to retake such person, in the same manner as any person accused of any crime against the laws of that part of Her Majesty's Dominions to which he or she shall so escape may be retaken upon an escape."

Next it enacts, "that where any person who shall have been committed under this Act, to remain until delivered up pursuant to requisition as aforesaid, shall not be delivered up pursuant thereto, and conveyed out of Her Majesty's dominions within two calendar months after such Committal, over and above the time actually required to convey the

prisoner from the gaol to which he or she was committed by the readiest way out of Her Majesty's dominions, it shall in every such case be lawful for any of Her Majesty's Judges in that part of Her Majesty's Dominions in which such supposed offender shall be in custody, upon application made to him or them by or on behalf of the person so committed, and upon proof made to him or them that reasonable notice of the intention to make such application has been given to some or one of Her Majesty's Principal Secretaries of State, or in Ireland to the Chief Secretary of the Lord Lieutenant of Ireland, and in any of Her Majesty's Colonies or possessions abroad for the Officer administering the Government of any such Colony or possession, to order the person so committed to be discharged out of custody, unless sufficient cause shall be shown to such Judge or Judges why such discharge ought not to be ordered."

Section five enacts, "that if, by any law or ordinance to be hereafter made by the local Legislature of any British Colony or possession abroad, provision shall be made for carrying into complete effect within such Colony or possession the objects of this present Act, by the substitution of some other enactment in lieu thereof, then it shall be competent to Her Majesty, with the advice of Her Privy Council, (if to Her Majesty in Council it shall seem meet, but not otherwise,) to suspend the operation, within any such Colony or possession, of this present Act so long as such substituted enactment shall continue in force there, and no longer."

In 1849 our Colonial Legislature passed an Act entitled, "An Act for *better* giving effect *within* this Province, to the Treaty," &c. It recites the tenth article of the Treaty, and further, "that certain provisions" of the 6 & 7 Vic. cap. 76, "have been found inconvenient in practice in this Province," and "more especially that provision which requires that before any such offender as aforesaid shall be arrested, a warrant shall issue under the hand and seal of the person administering the government, to signify that such requisition as aforesaid hath been made by the authority of the United States," &c., "inasmuch as by the delay occasioned by compliance with the said provision, an offender may have time afforded him for eluding pursuit."

It then enacted, "that it shall be lawful for any of the judges of any of Her Majesty's superior courts in this Province, or for any of Her Majesty's justices of the peace in the same, and they are hereby severally vested with power, jurisdiction and authority, upon complaint made under oath or affirmation, charging any person found within the limits of this Province with having committed, within the jurisdiction of the United States of America, or of any of such States, any of the the crimes enumerated or provided for by the said treaty, to issue his warrant for the apprehension of the person so charged, that he may be brought before such judge or such justice of the Peace, to the end that the evidence of criminality may be heard and considered; and if, on such hearing, the evidence be deemed sufficient by him to sustain the charge according to the laws of this Province, if the offence alleged had been committed therein, it shall be his duty to certify the same, together with a copy of all the testimony taken before him, to the Governor or Lieutenant-Governor of this Province, or to the person administering the government of the same for the time being, that a warrant may issue, upon the requisition of the proper authorities of the said United States or of any of such States, for the surrender of such person, according to the stipulations of the said Treaty; and it shall be the duty of the said judge or of the said Justice of the Peace to issue his warrant for the commitment of the person so charged to the proper Gaol, there to remain until such surrender shall be made, or until such person shall be discharged according to law."

It then in effect enacted sections 2, 3 and 4, of the English Act, with this addition, that section 2 of our Act sanctioned a requisition from the United States, "or any of such States."

The Queen afterwards with the advice of Her Privy Council, suspended the operation of the 6 & 7 Vic. cap. 76, within the Colony of Canada, so long as our substituted enactment (12 Vic. cap. 19) should continue in force and no longer.

This was the state of our law till December 5th, 1859, when the 12 Vic., cap. 19, was carried into the Consolidated Statutes, as chapter 19 of Canada. It being declared that the "Consolidated Statutes shall not be held to operate as new laws, but shall be construed and have effect as a consolidation and as declaratory of the law as contained in the said acts, and parts of acts repealed, and for which the Consolidated Statutes are substituted" (cap. 29, sec. 8); it was deemed unnecessary to procure a further order from the Queen in Council, still suspending the operation of the 6 & 7 Vic. cap. 76. So the law continued till 1861, when, in order to give still better effect to the treaty, it was deemed expedient by the Legislature to allow only certain magistrates, qualified because of their position and knowledge of law, to act in carrying out the provisions of the treaty, so as to avoid if possible

the consequences of the blunders of ignorant or incompetent magistrates. Accordingly, sections 1, 2 and 8 of the Consolidated Statute, chapter 89, were repealed and new provisions substituted, framed with the view we have mentioned. The right of any one of the States of the Union to make requisition ceased by the same act to be sanctioned. There were other alterations in language subservient to the design of the act of little consequence, and which we have not space at present to notice. The latter act in due course, and as a matter of precaution, received the sanction of the Queen in Council, at a Court holden at Balmoral on October 11, 1861.

Thus we have in general terms presented to our readers the tenth article of the Ashburton Treaty, and our legislation in reference thereto down to the present time.

We now propose to examine the language of the article of the Treaty itself by the light of adjudged cases.

The treaty is a contract between two sovereign states. Like other contracts, it must be so construed that effect be given to it, and to every word of it, with a view to the carrying out the object of the parties. That object is to punish crime; and subordinate thereto to apprehend, try and punish fugitive criminals. Crime is local, and, in general, can only be punished in the country where committed. Criminals endeavour to evade the punishment due to crime, and so at times flee from the jurisdiction that has the power to punish, into the territory of some adjacent power. The mutual obligation of the treaty is the surrender of such fugitives. But this cannot be done without machinery, and the machinery cannot be put in motion without expense. Hence we find in the treaty, besides the general obligation to deliver fugitives from criminal justice, stipulations in regard to the machinery to be used, and provisions for the payment of all expenses attending the same.

The article of the treaty therefore may be considered in a three fold aspect. 1. The obligation. 2. The machinery; and 3. The expense.

1.—The Obligation.

The two nations agree that, upon "mutual requisitions by them or their ministers, officers or authorities, respectively made"—that is, on a requisition made by the one government, or by its ministers or officers properly authorised, upon the other—the government upon whom the demand is thus made shall deliver up to justice, &c. In other words, on a demand made by the authority of either government on the other, the fugitive shall be delivered up. This is the exact stipulation entered into when plainly interpreted. It is a compact between two nations, in respect to a matter of national concern—the punishment of criminal offenders against their laws. The duty or obligation entered into is the duty or obligation of the respective nations; and each is bound to see that it is fulfilled, and each is responsible to the other in case of a violation. When the *casus fœderis* occurs, the requisition or demand must be made by the one nation upon the other: (*In re Kane*, 14 Howard, 103.) The treaty should be construed in a fair and liberal spirit. There should be no laboring with legal astuteness to find flaws or doubtful meanings in its words, or in those of the legal forms for carrying it into effect. We are to regard its avowed object—the allowing of each country to bring to trial all persons charged with the expressed offences. Neither of the parties can properly have any desire to prevent such trial, or to shield a possible offender: (per Hagerty, J., in *re Burley*, 1 U. C. L. J. N. S. 50.)

The treaty is silent as to the form of the requisition, and equally silent as to the time when it should be made. The requisition may, it is apprehended, be in the form of a letter from the Secretary of State, or other accredited officer of the government, requiring the surrender; and may, it is apprehended, so far as we are concerned, be made either before or after proceedings commenced against the fugitive in our country. The English statute 6 & 7 Vic. cap. 76, s. 1, provides that "*in case* requisition shall at any time be made, &c., *it shall be lawful* for one of her Majesty's principal Secretaries of State to signify that such requisition *has* been made, and to require all justices, &c., *and thereupon* it shall be lawful for any justice, &c." Reading this, one would suppose that, before the justice can act, there must be first the requisition from the foreign government, and then the warrant from the Secretary of State to all magistrates, &c. This act is still in force in New Brunswick; and in the case of the Chesapeake, it was there held that these warrants should precede the jurisdiction of the local magistrate; but in

Upper Canada they are not conditions precedent to the jurisdiction of the magistrate: (*In re Anderson*, 11 U. C. C. P. 1. *In re Burley*, ante.) Our legislature, as we have shown, in 1849, expressly declared that the requisition or warrant of the Governor General should not be a condition precedent. The delay in obtaining the requisition or warrant might be so great as to afford the accused certain means of escape. Our legislature intended to remedy this evil, and the act they passed has done so. (per Richards, C. J., in *re Burley*.)

The delivery is to be of "*all* persons, &c." implying subjects of both nations (*In re Burley*), as well slaves as freemen: (*In re Anderson*). In the former case it was contended that a natural born subject of her Majesty, accused of having committed crime in the United States, was not within the treaty; but the judges considered the point too clear for argument, and unanimously held that British subjects committing crime in the United States are within the treaty. In the latter case it was said that, to treat slaves as "chattels," and therefore excluded from the treaty, would have the effect of encouraging slaves to rob and to murder, and to make Canada their asylum—a result which could never have been contemplated, and too dreadful to be seriously argued. The language "all persons," is too plain to be mistaken. The words should receive a liberal interpretation, and hitherto have done so.

But the delivery is to be of all persons "who, being charged, &c." The meaning of the word "charged" is by no means clearly ascertained. Technically it may be said to mean "charged by information;" but its common acceptation is that of being accused, and in the latter sense it seems to be used. But the treaty does not contemplate persons being surrendered upon mere suspicion, and it is well that it does not, for there are so many inducements to procure extradition of individuals, upon pretence of crime, falling within the treaty, so as to restore them to foreign jurisdiction for other purposes, that a treaty less guarded than the one under consideration might lead to oppression: (per Sullivan, J., in *re Kermott*, 1 U. C. Cham. R. 256.) Whatever power a magistrate may have to detain upon evidence amounting to mere suspicion, for the purpose of other testimony being imported into the case, it is clear that a judge before whom the prisoner is brought for his discharge on habeas corpus has no such power. (*Ib.*) The treaty has been held to apply to persons *convicted* of crime in the United States and fleeing to Canada: (*In re Asher Warner*, 1 U. C. L. J. N.S. p. 16.) So far as the technical complaint is concerned, it need not be laid in the United States before being laid here.

It is clear, from the provisions contained in our act, that the proceedings for arrest may be commenced in this province: (per Draper, C. J., in *re Anderson*, 11 U. C. C. P. 53; and in *re Burley*.) The treaty is intended to attach only on those whose crimes as well as flight have taken place since the treaty: (per Baron Platt, in *Regina* v. *Clinton*, Law Times, Nov. 1, 1845.)

The treaty is restricted in its terms to seven specified crimes, thus, "who being charged with the crime of murder, assault to commit murder, piracy, arson, robbery, forgery, or utterance of forged paper, &c." Murder is an offence against the laws of every civilized community, and equally known to the laws of all. The assault to commit murder is also made criminal by the laws of most civilized nations. Piracy, as used in the treaty, has been held by a majority of the judges of the Queen's Bench in England to mean municipal piracy, and not piracy on the high seas, which, being an offence against the laws of nations, may be tried in any country: (*Reg.* v. *Tivnan*, 10 L.T. N.S. 500.) Arson is a crime well known to the laws of both countries at the time the treaty was made, and equally punishable by the laws of both countries. The same may be said of robbery, forgery, and the utterance of forged paper. But neither the treaty nor the statutes passed under it are to be taken as founded on a presumption that the criminal or civil laws prevailing in the territories of the two contracting parties would be found in all respects identically the same. In arson and in forgery, for instance, it is likely there may be points of difference as regards the description of property, and of the written securities, which it is the object of the law in the several countries to protect: (per Robinson, C. J., in *re Anderson*, 20 U. C. Q. B. 171.)

The particular crime must be shewn to have been committed within the "jurisdiction" of the country demanding the surrender. The word "jurisdiction" may mean either "territory" or "judicial authority." We incline to

the opinion that it means simply territory; and such was the recent decision of Mr. Justice Smith, in the case of the St. Alban's raiders, still pending in Lower Canada. Such also was the opinion expressed by Chief Justice Cockburn, in *Reg.* v. *Tivnan*, 10 L. T. N.S. 500, though his learned brethren, Crompton, J., Blackburn, J., and Shee, J., inclined to a contrary opinion, and introduced the word "exclusive" before the word "jurisdiction," as used in the treaty. The main question, however, as already mentioned, decided by them, is that piracy *jure gentium* is not within the treaty; a decision which confirmed the views of Mr. Justice Ritchie, of New Brunswick, as expressed in the case of the Chesapeake, and which has since been approved by the learned Commissioner who decided *In re Bennett*, 11 L. T. N.S. 488. Notwithstanding such eminent authority, we are by no means satisfied that Chief Justice Cockburn was wrong, and shall look for further discussion on the meaning of the word "piracy," as used in the treaty, before the interpretation of it by the majority of the judges of the Queen's Bench is accepted as correct by both parties to the treaty.

The word piracy appears to be used in its widest sense. Municipal piracy is, we believe, an offence unknown in England. One would think that the offence intended was one not only known to both countries, but common to both countries. Had the contrary been intended, we should have expected to find piracy by municipal law in some way distinguished from piracy as understood by the law of nations. It is said, and with truth, that the mischief which the extradition treaty was intended to prevent was that of persons committing crimes within the territory of one nation and escaping out of that jurisdiction with impunity. That such was the primary object of the treaty there can be no doubt, but that it was the only one is a subject of great doubt; but it is impossible not to see that the mischief is not limited to such cases. It may be that an offenec may be cognisable in two countries, as in the case of murder committed by one British subject upon another, in the United States, in which case the offence might be tried in Britain by the municipal law of that country. Yet it would be highly inconvenient that he should be tried in Britain, because criminals may escape punishmeat not only by going beyond the territory and reach of the laws of that country in which the crime is committed, but also by failure of evidence in the country where tried, and the difficulty of adducing sufficient evidence, except in the country where the crime has been committed, If the language of the statute is large enough to embrace both these kinds of mischief, it is highly expedient to restrict it to one only: (per Cockburn, C. J., in *Reg.* v. *Tivnan*, 10 L. T. N.S. 500.)

Much stress was laid by Mr. Justice Crompton upon the words "shall seek an asylum," as used in the treaty. He said, an asylum means a place where the criminal is safe from prosecution or pursuit—not a place where he may be tried and convicted. But the treaty uses the words "shall seek an asylum;" in other words, shall flee to *in the hope* of finding an asylum. It does not follow that because *he thinks* the particular country to which he may flee an asylum, that he will independently of treaties *necessarily* find it so. He may be mistaken. Besides the treaty does not stop with the words "shall seek an asylum," but proceeds, "or shall *be found within* the territories of the other." Whether he seeks an asylum there or not, if after the commission of the crime he is found there he shall be liable to be surrendered. It seems to us that the construction placed upon the treaty by the majority of the judges was needlessly narrow, and it yet remains to be seen whether it will be accepted by the highest courts of the United States as their construction of the act.

2.—The Machinery.

The crime is one thing; the evidence to prove it is an entirely different thing. While we accept the law of the foreign country to establish the crime, yet the facts which go to establish the crime, as defined by the foreign law, must be proved by such rules of evidence as prevail in our own country. Here we find nothing more nor less than the distinction between the *lex loci* and the *lex fori*—the former relating to the principal fact, the crime—the latter relating to the minor facts or means of proof. This we take to be the meaning of the proviso in the treaty, "that this shall only be done upon such evidence of criminality as, according to the laws of the place where the fugitive or person so charged shall be found, would justify his apprehension and committal or trial if the offence had been there com-

mitted." The legal sufficiency of the evidence of criminality is to be determined by the justice. It has been argued that both the passages in the treaty, in which the sufficiency of the evidence is spoken of, have reference to the laws of this province, not merely as regards the nature of the proof that may be received, but also to the law of this province as regards the particular offence; but the court of Queen's Bench declined to adopt such an argument: (*In re Anderson*, 20 U. C. Q. B. 169.) So far as regards the means of proof, there is no doubt our law must govern. Thus, if the law of the foreign state should admit a confession extorted from a slave by violence, such evidence, when produced here, would be rejected. So if the law of the foreign state should allow evidence of a freeman, not under oath, to be admitted against a slave charged with having committed a crime against a freeman, no justice would act on such evidence here. (*Ib.*)

The treaty specifies no particular magistrates. It declares that "the respective judges and *other* magistrates of the two countries shall have power, &c. There is a great difference between magistrates in England and magistrates here. In the former, for the most part, magistrates are gentlemen of leizure and of education. In this country there is less leizure and less education among magistrates than in England. But even in England it is now proposed by the Lord Chancellor to cancel the commissions of amateur justices, and allow stipendiary or skilled magistrates only to act. The necessity for such a step in this country is tenfold what it is in England. The appreciation of this necessity induced our legislature, as already mentioned, in 1861, to restrict the power of acting in aid of the Ashburton treaty to Judges of the Superior Courts, Judges of County Courts, Recorders, Police Magistrates, Stipendiary Magistrates, Inspectors and Superintendents of Police. While the circle is diminished, the efficiency of the treaty is really the better secured. In other words, what we lose in quantity we make up in quality.

The jurisdiction of the judges, &c., is conferred in these words, "shall have power, jurisdiction and authority, upon complaint made under oath," &c. The jurisdiction is made to depend on a complaint made under oath. That complaint, as we have already had occasion to explain, may, in the first instance, be made here. When made, the power, &c., is to issue a warrant "for the apprehension of the fugitive or person so charged," to the end "that the evidence of criminality may be heard and considered." Grave doubts are by many entertained as to the power of the magistrate under this treaty to hear evidence for the defence. The words "evidence of "*criminality*" have by some been supposed to exclude exculpatory evidence as evidence in excuse. The practice is by no means uniform either here or in the United States or in England. The more prudent course adopted, owing to the prevailing doubts on the point, has been to receive evidence for the defence. This course has at length received the sanction of the Chief Justice of our Common Pleas, though the Chief Justice of Upper Canada is apparently studiously silent on the point.

The language of the Chief Justice of Common Pleas (*In re Burley*, 1 U. C. L. J. N.S. 46) is as follows:—"As to receiving evidence on behalf of prisoners, against whom charges are made as fugitive offenders, I do not see why the same course should not be pursued as in the ordinary examination of persons charged with offences committed in this Province. In Wise's Supplement to Burns' Justice, edition of 1852, it is recommended that such evidence be taken, if offered. The observations of various judges are therein referred to as recommending it, and the opinion of the present Chief Justice of England, when at the bar, in favor of that course, is given. One ground on which he based his recommendation was, that the Imperial act then in force, relative to duties of justices of the peace out of sessions, similar to our Provincial statute of Canada, cap. 102, sec. 30, directed the magistrate to take the statement on oath or affirmation of those who know the facts and circumstances of the case, and to put the same in writing. The words of our statute (24 Vic. cap. 6) are, 'to examine upon oath any person or persons touching the truth of such charge.' This language would, in my judgment, authorize the examination of the prisoner's witnesses as much as that used in the section quoted from the Consolidated Statute of Canada, chapter 102."

The preliminary investigation takes place here. The trial is to be had abroad. Our judges sit as it were ministerially in aid of the foreign tribunal, which is the proper and only one to try disputed questions of fact, or infe-

rences from facts. Unless it can be said there is nothing for a jury—the facts being undisputed, and the only thing in dispute being the law, the prisoner should be committed: (per Draper, C. J., *In re Anderson*, 11 U. C. C. P. 60.) If the judge were, as an ordinary magistrate, investigating a case of our own, and would commit for trial here, he should commit for that in the foreign country: (per Ritchie, J., in the case of the Chesapeake.)

The judge, &c., having heard and considered the evidence, must determine if it be "sufficient to sustain the charge." We have no right to assume that he will not be fairly tried in the United States, nor can we be influenced by any consideration of what may be properly or improperly done with him after the trial. The treaty is based on the assumption that each country should be trusted with the trial of offences committed within its jurisdiction. If that confidence be shaken so as to weaken the efficiency of the treaty, the remedy is to abrogate it: (per Robinson, C. J., in *re Anderson*, 20 U. C. Q. B. 173; per Hagarty, J., in *re Burley*, p. 50; see also Vattel, c. 2, c. 6, s. 76.)

The word "sufficient," as here used, means sufficient not only in point of law, but in point of fact; or, in other words, sufficient to put the party accused on his trial for the offence of which he is accused.

The judge of the sufficiency is the judge who heard the evidence, and apparently he alone. From his decision as to the sufficiency or insufficiency of the evidence no appeal is given. He exercises a statutory power, and the statute which creates the power provides for no review of his decision on the evidence, except by the government, to whom he is required to certify the evidence, or a copy of it. Can there be an appeal from his decision to any intermediate tribunal not mentioned in the treaty or statutes passed to give effect to it? The late Mr. Justice Sullivan (*In re Kermott*, 1 U. C. Cham. Rep. 253) assumed that there was such an appeal on habeas corpus to a judge in Chambers, and discharged the prisoner. The late Sir James B. Macaulay, (*In re Tubbee*, 1 U. C. Pr. Rep. 98) expressed strong views in favor of such an appeal, though the prisoner before him was discharged on wholly different grounds. The late Sir John B. Robinson, in Anderson's case, 20 U.C. Q.B. 166, though expressing great doubts as to any such power, did in fact entertain an appeal from the decision of a magistrate on a question as to the sufficiency of evidence. Chief Justice Draper, in Anderson's case, as reported in 11 U. C. C. P. 59, said there is some difficulty in affirming that this court can review the decision of a judge or justice under the treaty. In the same case, at p. 67, Mr. Justice Hagarty was more decided, and said, "I do not understand that either of the Superior Courts can assume the task of examining the depositions, and judge them sufficient to sustain the charge." To the same effect is the language of Mr. Justice Ritchie, in the case of the Chesapeake. So Mr. Justice Crompton, in *Reg. v. Tivnan*, 10 L. T. N. S. 501, said, "all I think we have to consider is whether there was *any* evidence on which the magistrate could reasonably, in the exercise of his discretion, commit these prisoners to gaol for the purpose of being delivered up to the United States authorities. * * * We are not the proper parties to judge of the evidence, but we have the power of saying that there is *no* evidence before him on which he ought legally to come to the conclusion to commit them to gaol. * * * It is not for us to weigh the effect of evidence which is for the magistrate, &c." So far, the weight of authority is decidedly against the power to review the decision of the magistrate on the evidence, and such we should unhesitatingly declare to be the law as now established, were it not for the recently expressed opinion of Chief Justice Richards (*In re Burley*, 1 U. C. L. J. N.S. 46). The opinion of that learned judge is entitled to great weight, and the expression of it in the case to which we have just referred leaves the decided cases on this point in any thing but a satisfactory state.

The magistrates having found the evidence sufficient to commit the party for trial, is, according to the treaty, "to certify the *same*," and, according to our act, "to certify a copy of the same," to the proper executive authority, that a warrant may issue for the surrender of the fugitive. There must of course be a commitment by the magistrate of the fugitive. The warrant of commitment, if only till "discharged by due course of law," without saying "until surrendered, &c.," would be bad: (*In re Anderson*, 11 U. C. C. P. 1.) It need not set out the evidence (*In re Burley*); and for the reasons that we have already mentioned, need not recite a prior charge in the

foreign country, or the warrant of the Governor General here: (*Ib.*) A form of warrant is given in the schedule to the English statute 8 & 9 Vic. cap. 120; but as that act is apparently not in force here, the form which it gives ought not to be too closely followed. In case the person committed be not conveyed out of the province within two months after commitment (over and above the time required to convey the prisoner from the gaol to which he has been committed, by the nearest way out of the province), any of the judges of the superior courts having power to grant a habeas corpus, upon application made to him or them by or on behalf of the person committed, and upon proof made to him or them that reasonable notice of the intention to make such application has been given to the Provincial Secretary, may order the person so committed to be discharged out of custody, unless sufficient cause be shown why such discharge should not be ordered. This is in effect the same as sec. 4 of the Imperial Statute 6 & 7 Vic. c. 76, from which it is apparently taken. The act of Congress of the United States, passed on 12th August, 1848, contains a like provision: (Con. Stat. Can. c. 89, s. 4.)

It is not said expressly in the treaty, nor except by inference in any of the statutes under it, *where* the surrender is to be made. It is provided by sec. 4 of 24 Vic. c. 6, that "the person or persons authorized as aforesaid (i.e. authorized in the name and on behalf of the United States to receive), may hold such person in custody and take him to the territories of the said United States, pursuant to the said treaty; and if the person so accused escapes out of any custody to which he stands committed, or to which he has been delivered as aforesaid, such person may be retaken in the same manner as any person accused of any crime against the laws of this province may be retaken upon an escape." Such is the language of sec. 8 of the Imperial Statute already quoted.

The clear intendment of the enactment is, that the delivery shall take place to the United States messenger within our territory; for it provides for the conveyance of the fugitive in the charge of that messenger to the territories of the United States, which means to the frontier, and also provides for an escape within our territory whilst in the like custody. The third section of the Act of Congress of the United States, passed 12th August, 1848, is to the same effect. This being so, both powers agree as to the interpretation of the Treaty, so far as this point is concerned.

3.—Expenses.

The extradition under the Treaty is deemed for the benefit of the party requiring the surrender. In truth it is for the benefit of both countries that criminals should be punished, but the assumption of the treaty is just what we have mentioned. This being so it is considered only fair that "the expense of apprehension and delivery should be borne and defrayed by the party who makes the requisition and receives the fugitive." By making the requisition the party making it asssumes the responsibility of paying the expenses of apprehending as well as delivering the fugitive (per Richards, C. J., in *re Burley*). The ordinary expenses, including fees to counsel, would seem to be intended (7 opinion Attorney General U. S. 612).

Effect of Surrender.

The surrender is made for trial on a particular charge expressed in the treaty, and for that only. The foreign government can only try the fugitive on the charge for which he is surrendered (per Richards, C. J., in *re Burley*, p. 45). What is to become of him afterwards is not so easily determined. Sir John B. Robinson, in the case of Anderson the escaped slave, said, "We are not to be influenced by the consideration (a very painful one in all such cases) that the prisoner, even if he be wholly acquitted of the offence imputed to him, *must* remain a slave in a foreign country" (20 U. C. Q. B. 173). But notwithstanding the dictum of a judge so eminent, we venture to affirm that the surrender being for a special purpose, and for that purpose only, the fugitive, when that purpose is attained, should be free to return to his asylum. The surrender is made of a person accused of crime to be tried on that accusation. If not guilty of the charge of which accused and for which surrendered he should not be, it seems to us, be retained on a different charge, or because of any municipal law or lien. The latter we do not recognize, and but for the treaty we are not bound to recognize the former. So it is apprehended an arrest of the fugitive in the foreign country on civil process of any kind for an offence not within the

Treaty, or in truth for any offence other than that for which surrendered, before an opportunity to him to return to his asylum, would be illegal. Otherwise surrenders might be obtained ostensibly for crimes specified, but really for civil procedure and civil jurisdiction, or ostensibly for a crime mentioned in the Treaty and really for one not so mentioned, and thus a trick practised upon the power surrendering. If the accused, though acquitted of the offence for which he is surrendered be guilty of other offences, and these be specified in the Treaty, there is nothing to prevent his second extradition on the new charge or charges.

## ORDERS OF THE COURT OF CHANCERY.

We publish hereunder the orders of the Court of Chancery, promulgated February 6, 1865.

They effect several important changes in Equity practice, which will be appreciated by the practitioners in that Court. The orders came into force on the twentieth day of last month. They are as follows:—

1.—Pleadings and all other proceedings in a cause may be written or printed, or partly written and partly printed.

2.—When wholly printed, dates and sums occurring therein are to be expressed by figures instead of words.

3.—All such pleadings and other proceedings are to be so written or printed neatly and legibly on good paper, of the size and form heretofore in use; and if printed, the same are to be printed with pica type, and the solicitor is not to be entitled to the costs of any pleading or other proceeding which is not in conformity with this Order; and the Registrar is to refuse to file the same.

4.—Office copies of bills are not to be certified by the Registrar or Deputy Registrar, but shall be authenticated by the stamp of the office, and the usual signature of the Registrar or Deputy Registrar at the foot of the bill.

5.—The service of any bill within the jurisdiction of the Court is to be of no validity if not made within twelve weeks after the filing of the bill; and the service of an amended bill upon parties added by amendment, is to be of no validity if not made within twelve weeks after such amendment; and the service of any bill without the jurisdiction of the Court is to be of no validity, if not made within a period consisting of twelve weeks, added to the time limited by the General Orders for the answer of defendants served without the jurisdiction, such time to be computed from the filing of the bill as to parties made defendants by the original bill, and from the amendment of the bill as to parties added as defendants by amendment; but service may be allowed by a Judge when made after the periods above limited, upon its being made to appear to his satisfaction that due diligence has been used in effecting such service.

6.—A defendant is to admit in his answer such of the allegations contained in the plaintiff's bill as are to the knowledge of such defendant true, or the truth of which he can readily ascertain, or as he has reason to believe and does believe to be true; and it shall be sufficient if such admissions are expressed to be only for the purposes of the suit in which the same are made.

7.—Plaintiffs are to admit in their replication such facts alleged by the answer as are to the knowledge of the plaintiffs or any or either of them true; or the truth of which they or he can readily ascertain, or as they or he have or has reason to believe, and do or doth believe to be true; and it shall be sufficient if such admissions are expressed to be only for the purposes of the suit in which the same are made.

8.—The replication may hereafter be in the following form:—

I admit, &c., and I join issue with the answers of the defendants, C. D., &c., except in so far as I have herein made admissions in regard to allegations contained in such answers, and I will hear the cause upon bill and answer against the defendants, E. F., &c., and *pro confesso* against the defendants G. H., &c., as the case may be.

9.—Such admissions are, in all cases where it is practicable, to be by reference to the numbers of the paragraphs in the bill or answer to which they relate, with such qualifications as may be necessary or proper for protecting the interests of the party making such admissions; and it shall not be necessary or proper, in any answer or replication, to allege ignorance of any fact stated in the bill or answer, or any other reason for not admitting any fact therein alleged.

10.—Such admissions may be in the following form:

I admit, or for the purposes of this suit I admit, the truth of the allegations contained in the plaintiff's bill, or of the answer of the defendant C. D., or the allegations contained in the —— paragraph of, —— or so much of the allegations contained in the —— as commence with the words, "————," and ends with the words, "————," or I admit, &c., save and except that I say, (stating qualifications of admission, if any.)

11.—When it becomes necessary to adduce evidence, or to incur expense otherwise, in order to establish or prove facts, which, in the judgment of the Court, upon the hearing of the cause, ought to have been admitted, it shall be competent to the court to make such

order in respect to the costs occasioned by the proof of such facts, as under all the circumstances shall appear to be just.

12.—Office copies of answers, affidavits and other proceedings are dispensed with; and where service is required true copies, instead of office copies, are to be served; but this Order is not to apply to bills or decrees, of which office copies are by the practice of the Court required to be served.

13.—Not more than four copies of any pleading or other proceeding are to be allowed to any party, in a cause or matter, exclusive of the draft, but inclusive of copies to file, copies to serve, copies for briefs, and any other copies that may be required or made in the progress of the cause.

14.—If more than three copies, exclusive of the draft, are required of any pleading or other proceeding, and the party chooses to have the pleading or proceeding printed for the purposes of the suit or matter, he is in lieu of all charges for copies, to be allowed thirty (30) cents per folio of the pleading or proceeding, and his reasonable disbursements of procuring the same to be printed.

15.—Every defendant, appearing by a different solicitor, is entitled to demand from the plaintiff two copies of any printed bill, paying for each copy two cents per folio.

16.—After replication is filed, any party may call on the other by notice to admit any document, saving all just exceptions, and in case of refusal or neglect to admit, the costs of proving the document shall be paid by the party so neglecting or refusing, whatever the result of the cause may be, unless at the hearing the Judge certifies that the neglect or refusal to admit was reasonable; and no costs of proving any document are to be allowed, unless such notice is given, except in cases where the omission to give the notice was in the opinion of the Taxing Officer a saving of expense.

17.—The notice may be in the following form:—

In Chancery.

Between A. B.,.....*Plaintiff*,

and

C. D.,.....*Defendant*.

Take notice, that the plaintiff (or defendant) proposes to adduce in evidence the documents hereunder specified, and that the same may be inspected by the defendant, (or plaintiff,) his solicitor or agent, at ——, &c., on ——, &c., between the hours of ——, &c.; and the defendant (or plaintiff) is hereby required, within four days from the said day, inclusive, to admit that such of the said documents as are specified to be originals, were respectively written, signed or executed, as they purport respectively to have been; that such documents as are stated to have been served, sent or delivered, were so served, sent or delivered, respectively; saving all just exceptions to the admitting of such documents as evidence in this cause.

Dated this —— day of —— 186 —.

Yours, &c.

To S. ————, &c.

&c., &c., ——.

18.—The notice is to be served not less than two clear days before the day appointed for inspection.

19.—No order is to issue in cases within the first section of the 13th Order of June, 1853, for taking a bill *pro confesso;* but in lieu thereof the plaintiff is to file the usual affidavit of service of the bill, and a prœcipe requiring the Registrar or Deputy Registrar to note that the defendant is in default for want of answer, and that the bill is to be taken *pro confesso* against him. This prœcipe may be filed at any time within six calendar months after service of the bill. If the defendant is in default for want of answer, the Registrar or Deputy Registrar is to enter a note in the registry of pleadings, as required by the prœcipe, in the same manner as pleadings are entered therein, and the entry is to have the same effect as an Order for taking the bill *pro confesso:* the fee payable to the Registrar or Deputy Registrar thereon is to be fifty cents.

20.—No order of course, and no order obtained *ex parte* and not being of a special nature, is to be entered by the Registrar unless the entry thereof shall be directed by the Court or a judge; but this provision is not to be construed as applying to Decrees or Decretal Orders, or to Final Orders for sale or foreclosure.

21.—Where a defendant is entitled to give a notice to dismiss, it is not to be a sufficient answer to the motion for the plaintiff, after being served with the notice, to take out and serve an order for amending the bill, or to file a replication, or to undertake to speed the cause; but it shall be necessary for the plaintiff to shew that he has prosecuted his suit with due diligence, or that under all the circumstances the bill should not be dismissed.

22.—No notice to settle minutes or pass a Decree or Order is to be given unless by direction of the Registrar.

23.—Where a notice is given to settle minutes, or to pass a Decree or a decretal or other order, and the party served attends thereon, but the party giving the notice does not attend, or is not prepared to proceed, the Registrar may proceed *ex parte* to settle the minutes, or pass the Decree or Order, or may, in his discretion, order the party giving the notice to pay to the other the costs of his attendance; or if a party served asks for delay, the Registrar may grant the delay on such terms as he thinks reasonable as to payment of costs or otherwise.

24.—In a redemption suit, if the plaintiff does not redeem the defendants, or such of

them as he is ordered to redeem, the bill need not be dismissed; but where there are other defendants, in lieu of the bill being dismissed, the plaintiff may be declared foreclosed, and directions may be given, either by the Decree or by subsequent Orders, as to the relative rights and liabilities of the defendants as amongst themselves, and such proceedings are in such case to be thereupon had, and with the same effect, as in a foreclosure suit.

25.—In suits for foreclosure or redemption, where a reference is directed to ascertain incumbrances, it shall not be necessary to reserve further directions, but the decree directing such reference may direct that the times at which payment is to be made, or foreclosure or redemption is to take place, shall be, as to incumbrancers, or persons entitled to redeem, at the periods allowed by the practice of the Court; and such times shall be named and appointed by the Master or Accountant in his report; and such appointment shall have the same effect, and be acted on as if the times had been fixed according to the present practice by or under a decree on further directions; and any party entitled to and desiring a sale, is to make the deposit therefor within one week after the confirmation of the report; whereupon the Registrar is upon prœcipe to draw up an order to the same effect as the decree now made in such cases on further directions; and such order shall have the same effect, and be followed by the same proceedings as when a sale is ordered by a decree of the Court.

26.—Where a Decree or Decretal or other Order is not passed and entered within one calendar month from the day judgment is pronounced, the time allowed for re-hearing the cause, or varying or discharging the Order under the first General Order of the 10th of January, 1863, shall begin to run at the expiration of such calendar month.

27.—Petitions for re-hearing, certificates of Counsel thereon, and orders to set down for re-hearing, are abolished.

28.—In lieu thereof the party entitled to a re-hearing is to file a prœcipe, and serve notice as heretofore.

29.—If a party seeks to vary part only of a Decree or Order, he may, in the notice of re-hearing, state the part of the Decree or Order which he seeks to vary.

30.—It shall not be necessary to procure a Judge's fiat to a petition appointing a time and place for the hearing thereof, but in lieu of such fiat there is to be indorsed on the petition a notice addressed to the parties concerned, stating the time and place at which the petition is to be heard, and informing them that if they do not appear on the petition at such time and place, the Court may make such order, on the petitioner's own shewing, as shall appear just.

31.—Orders *nisi* are abolished, and in lieu thereof notice is to be given of the motion for an order absolute.

32.—The Accountant is to take and dispose of such references of account and other matters as shall from time to time be made to him by any Decree or Order.

33.—The Accountant is, in regard to matters referred to him, to have the same powers as the Master in Ordinary to issue warrants, make appointments, and settle and sign reports and certificates, and is to have all other powers and privileges of the Master; and the reports, certificates, and other acts of the Accountant, are to have the same effect, and be subject to the same Orders and Rules as those of the Master.

34.—The Accountant is to be entitled to take and receive for his own use, the same fees for all warrants, reports, certificates, and other matters as are allowed to the Local Masters.

35.—The Master in Ordinary, with the assent of the Accountant and either of the parties to the reference, may transfer to the Accountant any reference, or any part of a reference made, or which may hereafter be made, to such Master; and the certificate or report of the Accountant in such case is to have the same effect, to all intents and purposes, as a certificate, report, or separate report, (as the case may be,) of the Master; and where part only of a reference is so transferred, the Accountant, after signing the certificate or report, is to deliver the same to the Master, with the evidence taken and the papers used by and before him, in the matter of such reference.

36.—It shall be the duty of parties to raise before the Master, Accountant, or Local Master, in respect of any matter presented in his office for his decision, all points which may afterwards be raised upon appeal, and in case an appeal is allowed on any ground not distinctly taken before the Master, the Court may, in its discretion, order the appellant to pay the costs of the appeal.

37.—The Judges having observed in bills of costs which have come under their notice, numerous items allowed by Local Masters upon taxation, which are not warranted by the tariff, it is ordered, that every Local Master do forthwith, after taxing a bill of costs, transmit the same by mail to Toronto, addressed, "To the Taxing Officer of the Court of Chancery, Toronto," and he is to allow in the bill the postage for the transmission and return of the bill, and shall prepay the same; and is to allow in the bill the sum of one dollar as a fee to the Taxing Officer at Toronto, and the same, with postage stamps for the postage, is to be paid at the time of taxation by the party procuring the bill to be taxed; and the Local Master is to transmit with the bill to the Taxing Officer at Toronto,

the said sum of one dollar, and the postage stamps for the postage on the return of the bill to the Local Master.

38.—The Taxing Officer at Toronto, upon receiving the bill of costs, or as soon thereafter as his other engagements will permit, is to examine the same, and to mark in the margin such sums (if any) as may appear to him to have been improperly allowed, or to be questionable; and he is to revise the taxation, either *ex parte*, or upon notice to the Toronto agent (if any) of the solicitor whose bill is in question, as in his discretion he may see fit; but notifying such agent (if any) in all cases where the taxation is not clearly erroneous, or where the amount in question is so large as in the judgment of the Taxing Officer, to make such notification proper. Such notification may be by appointment mailed to the address of the agent (if any). If upon such revision the sums disallowed shall amount to one-twentieth of the amount allowed upon taxation, the Taxing Officer is to add to the amount taxed off, the amount of postages, and the sum of one dollar aforesaid, and is thereupon to re-transmit the bill so revised to the Local Master.

39.—No sum is to be inserted in the report of a Local Master as taxed and allowed for costs, until such revision by the Taxing Officer; but in a case of urgency, a writ of execution may issue to levy costs, or debt and costs, upon the order of a Judge, subject to the future revision by the Taxing Officer: and the party may without order issue at his own expense a separate execution for the debt before the revision takes place.

40.—The fee for a necessary common attendance, including prœcipe, if any, shall be fifty cents.

41.—A fee of twenty cents is to be paid by parties for every search in the office of the Master in Ordinary, Accountant, or Local Master, but it is to be taxed only when the search was, in the opinion of the Taxing Officer, necessary or proper.

42.—The fee on settling minutes and on passing Decrees or Orders may be increased in the discretion of the Registrar, in special cases, to two dollars, where the solicitor attends personally on such settling or passing.

43.—For attendance in the Master's office and in the office of the Accountant upon a warrant or appointment to hear and determine, it shall be in the discretion of the Master, Accountant, and Local Master, to increase the fee for such attendance to any sum not exceeding two dollars per hour, where, in the judgment of the Master, or other officer aforesaid, the matters to be heard and determined are of such special nature as to have required previous preparation, and where the Master shall find that previous preparation has been bestowed thereupon, and that in his judgment such increased fee is reasonable and proper under the circumstances; but no such allowance is to be made for more than one day, unless the hearing is proceeded with *de die in diem* to the conclusion thereof; or unless such proceeding be prevented by a party other than the one claiming the increased allowance; and the increased allowance is not to be made unless the same is noted at the time in the book of the Master, or other Officer aforesaid.

44.—The fee on the attendance of a solicitor upon the examination of parties or witnesses, where the solicitor attends in person, and no counsel is employed, may in special cases be increased in the discretion of the Judge, or Officer, before whom the examination is had, to two dollars, and where the examination occupies more than one hour, then to two dollars for every additional hour which is so occupied, and during which the solicitor is present in attendance thereupon, provided the same is noted at the time in the Registrar's book, or in the book of the Master, or other Officer, as the case may be.

45.—In all Decrees, Orders, Reports and Certificates, sums are to be stated in dollars and cents.

46.—Service upon solicitors of pleadings, notices, orders, and other proceedings, is to be made between the hours of ten o'clock, A.M., and four o'clock, P.M., except on Saturdays, when it shall be made between the hours of ten o'clock, A.M., and two o'clock, P.M. If made after four o'clock, P.M., on any day except Saturday, the service is to be deemed as made on the following day, and if made after two o'clock on Saturday, the service is to be deemed as made on the following Monday.

47.—Every Deputy Registrar is forthwith, after the 30th of June and 31st of December, in every year, to make a return to the Registrar at Toronto, of the number of bills, answers and demurrers, filed with such Deputy Registrar during the preceding six months, and is to transmit with such return the amount of fees payable into "The Suitors' Fee Fund Account." The Registrar is forthwith to deposit to the credit of the said account the sums so received, and is on the 31st day of January, and 31st day of July, in each year, to lay before the court a statement of the condition of the said account, and the names of the Deputy Registrars (if any) who are in arrear thereto.

48.—The foregoing Orders are to take effect on the twentieth day of February instant, as to all suits then pending, as well as to those instituted on or after that date.

P. M. Vankoughnet, C.
J. G. Spragge, V. C.
O. Mowat, V. C.

## INSOLVENT ACT—TARIFF OF FEES.

We are informed that the tariff of fees promulgated by the judges of the Superior Courts of Common Law and the Court of Chancery, under the Insolvent Act of 1864, has not been sent to the different County Court clerks in Upper Canada. This is not as it should be. One would imagine that the clerks, who are the taxing officers of bills of costs under the act, would be provided by the proper authorities with the means necessary for enabling them to perform their duties efficiently.

We now publish the tariff for the benefit of such as have it not, or who have not provided themselves with a copy of Mr. Edgar's work, which contains it:—

### TARIFF.

*Fees to solicitor or attorney, as between party and party, and also as between solicitor and client:*

| | |
|---|---|
| Instructions for voluntary assignment by debtor, or for compulsory liquidation, or for petition, where the statute expressly requires a petition, or for brief, where matter is required to be argued by counsel, or is authorized by the judge to be argued by counsel, or for deeds, declarations, or proceedings on appeal | $2 00 |
| Drawing and engrossing petitions, deeds, affidavits, notices, advertisements, and all other necessary documents or papers when not otherwise expressly provided for, per folio of 100 words or under | 0 20 |
| Making other copies when required per fo. | 0 10 |
| When more than *five* copies are required of any notice or other paper, five only to be charged for, unless the notice or paper is printed, and in that case printer's bill to be allowed in lieu of copies, drawing schedule, list, or notice of liabilities, per folio, when the number of creditors therein does not exceed twenty | 0 20 |
| When the number of creditors therein exceeds twenty, then for every folio of 100 words up to twenty, 20c., and for every folio over twenty | 0 10 |
| Every common affidavit of service of papers, including attendance | 0 50 |
| Every common attendance | 0 50 |
| Every special attendance on judge | 2 00 |
| For every hour after the first | 1 00 |
| To be increased by the judge in his discretion. | |
| Every special attendance at meetings of creditors, or before assignee, acting as arbitrator | 1 00 |
| Fee on writ of attachment against estate and effects of insolvent, including attendance | 2 00 |
| Fees on rule of Court or order of judge | 1 00 |
| Fee on sub. *ad test.*, including attendances | 1 00 |
| Fee on sub. *duces tecum*, including attendance | 1 25 |
| And, if above 4 folios, then for each additional folio, over such 4 folios | 0 10 |
| Fee on every other writ | 1 00 |
| Every necessary letter | 0 50 |
| Costs of preparing claim of creditors, and procuring same to be sworn to, and allowed at meeting of creditors, in ordinary cases, where no dispute | 1 00 |
| Costs of solicitor of petitioning creditor, for examining claims filed, up to appointment of assignee, for each claim so examined | 0 50 |
| Costs of assignee's solicitor for examining each claim, required by assignee to be examined | 0 50 |
| Preparing for publication advertisements required by the statute, including copies and all attendances in relation thereto | 1 00 |
| Preparing, engrossing, and procuring execution of bonds or other instruments of security | 2 00 |
| Mileage for the distance actually and necessarily travelled—per mile | 0 10 |
| Bill of Costs, engrossing, including copy for taxation, per folio | 0 20 |
| Copy for the opposite party | 0 50 |
| Taxation of Costs | 0 50 |

No allowance to be made for unnecessary documents or papers, or for unnecessary matter in necessary documents or papers, or for unnecessary length of proceedings of any kind. In case of any proceedings not provided for by this tariff, the charges to be the same, as for like proceedings, as in the tariffs of the Superior Courts.

### COUNSEL.

Fee on arguments, examinations, and advising proceedings, to be allowed and fixed by the judge as shall appear to him proper under the circumstances of the case.

### FEE FUND.

| | |
|---|---|
| Every warrant issued against estate and effects of insolvent debtors | $1 00 |
| Every other warrant or writ | 0 30 |
| Every summary rule, order, or fiat | 0 30 |
| Every meeting of creditors before judge | 0 50 |
| If more than an hour | 1 00 |
| If more than one on same day, $2.00, to be apportioned amongst all. | |
| Every affidavit administered before judge | 0 20 |
| Every certificate of proceedings by judge of County Court for a transmission to a Superior Court or a judge thereof | 0 50 |
| Every bankrupt's certificate | 1 00 |
| Every taxation of costs | 0 15 |

### FEES TO CLERKS.

| | |
|---|---|
| Every Writ, or Rule, or Order | 0 50 |
| Filing every affidavit or proceeding | 0 10 |
| Swearing affidavit | 0 20 |
| Copies of all proceedings of which copy bespoken or required, per folio of 100 words | 0 10 |
| Every certificate | 0 30 |
| Taxing costs | 0 50 |
| Taxing costs and giving allocatur | 0 65 |

For every sitting under commission, per day..... 1 00
If more than one on same day, $2.00 to be apportioned amongst all.
Fee for keeping record of proceedings in each case..... 1 00
For any list of debtors proved at first meeting, (if made) ..... 0 50
For any list of debtors at second meeting. 0 50
Any search..... 0 20
A general search relating to the bankruptcy of one person or firm..... 0 50

SHERIFF.

Same as on corresponding proceedings in Superior Courts.

WITNESSES.

Same as in Superior Courts.

## UPPER CANADA REPORTS.

### COMMON PLEAS.

(*Reported by* S. J. VANKOUGHNET, Esq., M.A., *Barrister-at-Law, and Reporter to the Court.*)

IN THE MATTER OF THE JUDGE OF THE COUNTY COURT OF THE COUNTY OF LAMBTON, IN A CAUSE IN THE FIRST DIVISION COURT OF THAT COUNTY, OF KEMP v. OWEN.

*Action in Division Court for goods—Cause of action—When same arose—Writ of prohibition.*

On an application for writ of prohibition on the ground that the cause of action did not arise within the jurisdiction of the judge of the county of Lambton.

*Held*, that where the defendant resided at G., at which place a bargain was made for the delivery of certain goods at W., and the bargain was fulfilled by such delivery and acceptance, that the cause of action arose partly at G. and partly at W., the judge of the county where W. is situate had no authority in respect of the cause of action.

*S. Richards*, Q. C., moved for and obtained a rule on the judge of the county court of the county of Lambton, and upon Kemp the plaintiff in the suit in question, calling upon them to shew cause why a writ of prohibition should not be issued to prohibit the said judge from further proceeding in the said suit, on the ground that the said court had no jurisdiction in the said plaint or action to hear or determine the same; he referred to *Watt* v. *VanEvery*, 23 U. C. Q. B. 196. The facts were that the defendant resided at Goderich in the county of Huron; a verbal bargain was made at Goderich between the plaintiff and the defendant for the delivery by the plaintiff of a certain quantity of coal oil at a certain price to the defendant at Wyoming in the county of Lambton. Nothing appears as to the time and place of payment. The oil was delivered at Wyoming, and this action is for the price of it, or for the balance of it.

*Harrison* shewed cause. The bargain being verbal, there was no enforceable contract until the delivery and acceptance of the oil at Wyoming, and there also the money was payable for it, as nothing had been agreed upon as to the time or place of payment. *Aris* v. *Orchard*, 6 H. & N. 160.

The judge enquired into the particular objections which were raised at the trial before him, and upon the same facts which are now before the court he determined that the cause of action did arise within the county of Lambton, and therefore this court will not re-try a matter which has been already tried and decided upon in the court below; *Newcomb* v. *DeRoos*, 6 Jur. N. S. 68; many other authorities were also cited, most of which are to be found in the decisions already mentioned.

*S. Richards* contra, referred to *Jackson* v. *Beaumont*, 11 Ex. D. 300, as shewing that the defendant not acquiescing in the judge's decision, but protesting against it, and the judge having no authority in fact, the defendant is not now precluded from this writ, which is one of right. *Wilde* v. *Sheridan*, 16 Jur. 426; *Bonsey* v. *Wordsworth*, 18 C. B. 325.

ADAM WILSON, J.— We think that the verbal bargain made at Goderich, effectuated by the delivery and acceptance of the goods at Wyoming, establishes very clearly, according to the authorities, that the cause of action did not arise, that is, did not wholly arise at Wyoming, but partly at Goderich and partly at Wyoming, and therefore the judge of the county of Lambton, in which Wyoming is situated, had not and has not authority in respect of the cause of action; and as it appears the defendant resides at Goderich beyond the county of Lambton, so he has not authority to try the cause in respect of the defendant's residence.

The case in 6 H. & N. 160, does not apply here, for in this case the verbal contract made at Goderich was the contract acted upon and carried into effect at Wyoming, so that it would have been necessary on the trial to prove what it was took place at Goderich, while, in the case referred to, the verbal bargain was abandoned and a new one was entered into when it came to be carried into effect by the addition of a new and important term to it. We think the rule must be made absolute.

Rule absolute.

### ELECTION CASES.

(*Reported by* R. A. HARRISON, Esq., *Barrister-at-Law.*)

THE QUEEN ON THE RELATION OF MCLEAN v. WATSON.

*Mayor—Contract—Disqualification—Two Relations for same cause at instance of different parties—Collusion.*

Where defendant at the time of his election to the office of mayor for the town of Goderich, was shown to be a party, as surety, to a bond given to the Corporation for the due performance of his duties by one of its officers, defendant was held to be disqualified from holding the office of mayor.

The judge before whom the case was heard, being of this opinion, declined to withhold his judgment, upon the allegation that there was a prior relation at the instance of a different relator against same defendant for same cause pending before a County judge, which relation, it was sworn, was collusive, and intended to protect defendant in the enjoyment of the office, contrary to law.

[Common Law Chambers, February 24th, 1864.]

The relator complained that James Watson, of the town of Goderich, in the county of Huron, and Province of Canada, Esquire, had not been duly elected, and had unjustly usurped the office of mayor of and for the said town of Goderich, in the county of Huron aforesaid, under the pretence of an election held on the fourth and fifth

days of January, one thousand eight hundred and sixty-four, at the town of Goderich aforesaid, in the said county of Huron, and declaring that he the said relator had an interest in the said election as a voter, shewed the following causes why the said election of the said James Watson to the office of mayor should be declared invalid and void:

*First*—That the said election was not conducted according to law in this: That the polls in the wards of St. David and St. Andrew, in the said town, were not kept open from ten o'clock in the forenoon until four of the clock in the afternoon during the said fourth and fifth days of January aforesaid; but on the contrary, that the poll in the said ward of St. David was closed and kept closed by the returning-officer thereof from the hour of twelve of the clock, noon, until the hour of half-past twelve of the clock in the afternoon, on the fourth and fifth days of January aforesaid; and that the poll in the said ward of St. Andrew was closed and kept closed by the returning-officer thereof from the hour of twelve of the clock, noon, to the hour of half-past twelve of the clock in the afternoon, on the fifth day of January aforesaid, and that during said time no access was or could be had to either of the said polls in either of the said two wards by any voter during the said last-mentioned time.

*Second*—That the said James Watson was not, at the time of his election, qualified to be a member of the council of the said corporation, because at the said time he was disqualified as having an interest in a contract with the said corporation in this: that one Charles Fletcher, of the said town of Goderich, was before and at the time of the said pretended election of the said James Watson as mayor, treasurer of the Municipal Corporation of the said town of Goderich; and that the said James Watson was, before the said election of mayor and for a long time thereafter, surety for the due performance of the duties of treasurer of the said Municipal Corporation of the town of Goderich by the said Charles Fletcher, by bond duly executed by the said James Watson to the said Municipal Corporation of the said town of Goderich, dated the fourth day of August, in the year of our Lord one thousand eight hundred and fifty-eight, and which bond was, at the said time mentioned, in full force, virtue, and effect.

*Third*—That the said James Watson was not, at the time of his election, qualified to be a member of the council of the said corporation, because at said time he was disqualified as having an interest in a contract with the corporation in this: that he the said James Watson, before and at the time of the said election, for a valuable consideration, held a shop-license from the Municipal Corporation of the said town of Goderich, for the sale of spirituous and other liquors, which said license was still in force, uncancelled and unrevoked.

James Shaw Sinclair made oath, that he was present at the nomination of candidates for the office of mayor of the town of Goderich, for the year one thousand eight hundred and sixty-four, which nomination took place on the twenty-first day of December, 1863. That James Watson attended at said nomination, and consented to his being nominated as a candidate, and addressed the electors in his own behalf. That the said James Watson exerted his influence on his own behalf during the fourth and fifth days of January, being the polling-days at said election. That deponent was present at the public declaration of the election of him the said James Watson, held on the seventh day of January, 1864, and that the said James Watson publicly thanked his supporters and accepted the office of mayor of the said town, for the year one thousand eight hundred and sixty-four. That deponent was present at the first meeting of council for the said town of Goderich, held on the eighteenth day of January, 1864, at which time the said James Watson filed his declaration of office of mayor, and took his seat as such mayor, and took part in the business of the said council as the head thereof.

Mr. Sinclair also made oath that he had searched in the office of the town-clerk of the town of Goderich, and found a bond from James Watson, Esquire, mayor of the said town of Goderich for the year one thousand eight hundred and sixty-four (together with other obligors therein named), to the Municipal Corporation of the said town of Goderich aforesaid, for the due performance of the duties of the office of treasurer of the said town by one Charles Fletcher. That he, deponent, knew the handwriting of the said James Watson. That the signature, "James Watson," set and subscribed to the bond, was the proper handwriting of the said James Watson. [Annexed was a copy of the bond.] That the said Charles Fletcher had for several years occupied the office of treasurer of the said town of Goderich; that he did on the twenty-first day of December last, and on the fourth and fifth days of January instant, occupy the said office of treasurer of the said town, and fulfil the duties thereof. That the said bond was in full force and effect from the day of the date thereof (being the fourth day of August, one thousand eight hundred and fifty-eight) up to and until after the said fourth and fifth days of January instant; and furthermore, until after the public declaration (as the law directs) of him the said James Watson as mayor of the said town of Goderich by the returning-officer of the said election, and that during all the said time the said bond of the said James Watson was in full force, virtue, and effect, according to the tenor thereof. That the said bond was accepted by the said Municipal Corporation of the said town, and held by them as a valid and subsisting security against the said James Watson, mayor of the said town of Goderich, elected on the fourth and fifth days of January, 1864, aforesaid, and the other obligors therein mentioned from the date thereof up to and until after the election and declaration of him the said James Watson as mayor aforesaid. That deponent was informed, and verily believed, the accounts of the said Charles Fletcher as such treasurer as aforesaid, had not been finally audited and settled between him as treasurer as aforesaid and the said Municipal Corporation of the town of Goderich, for the year one thousand eight hundred and sixty-three. That he, deponent, had caused search to be made in the office of the treasurer of the corporation of the said town of Goderich (he being the proper officer of

the said corporation to issue licences for the sale of spirituous liquors in shops and stores), and found that on the ninth day of March, in the year of our Lord one thousand eight hundred and sixty-three, a license to sell wine, beer, and other spirituous liquors by retail, was issued by the said town treasurer to the said James Watson, mayor of the said town of Goderich as aforesaid, and which said license was, as deponent was informed and verily believed, regularly issued by the said treasurer, as officer of the corporation aforesaid, to the said James Watson; and that the said James Watson paid therefor to the said treasurer, as such officer of the said corporation as aforesaid, the sum of thirty dollars currency of this Province, and that the paper annexed was a true copy of said license.

William Torrance Hays, made oath that at the election for the mayoralty of the town of Goderich aforesaid, on the fourth and fifth days of January, 1864, the poll in the ward of St. David, in the said town of Goderich, was not kept open from ten of the clock in the forenoon until four of the clock in the afternoon during the said fourth and fifth days of January aforesaid; but on the contrary, that the said poll was closed and kept closed by the returning-officer thereof from the hour of twelve of the clock, noon, until the hour of half-past twelve of the clock in the afternoon on the fourth and fifth days of January aforesaid; and also that the poll in the ward of St. Andrew, in the said town of Goderich, was, as deponent was informed and verily believed, closed and kept closed by the returning-officer thereof from the hour of twelve of the clock, noon, to the hour of half-past twelve of the clock in the afternoon on the fifth day of January aforesaid, and that during the said time no access was or could be had to either of the said polls in the said two wards by any of the voters thereof.

*M. B. Jackson* shewed cause, and filed the affidavit of William Fisher Gooding, wherein it was sworn, that on the twenty-first day of January, 1864, he instructed his attorney to commence proceedings against the defendant James Watson, to remove him from the office of mayor of Goderich, to which office he was elected at the late municipal election for said town, held on the fourth and fifth days of January. That a writ of *quo warranto*, duly issued, and was served on said Watson in pursuance of my said instructions. That he, deponent, voted against said Watson at said election, and did all he could to prevent his election to said office. That he, deponent, commenced and was carrying on, and intended to carry on to final judgment, the said proceedings against said Watson on said writ of *quo warranto*. That never before nor since the said proceedings were commenced by deponent, had he spoken to said Watson on the subject of said proceedings. That deponent did not commence nor carry on said proceedings in collusion with said Watson, nor for the purpose of preventing others from taking proceedings against him; but on the contrary thereof, commenced and was carrying on proceedings *bona fide*, and intended to remove said Watson from said office if he, deponent, could legally do so.

James Watson, the defendant, made oath, that on Friday, the twenty-ninth of January, 1864, he was served with the writ of *quo warranto* in this case. That on Thursday, the twenty-first day of January, 1864, and before he was served with the last-mentioned writ of *quo warranto*, and before he had any knowledge whatever that such writ had issued, he was personally served with a different writ of *quo warranto* on the relation of William F. Gooding. That the grounds of objection in both said writs were identical, as is also the office out of which it is attempted by both processes to remove deponent. That he instructed his attorney to defend the suit on the relation of said Gooding. That the same was returnable before the Judge of the County Court of the United Counties of Huron and Bruce, on the twenty-ninth day of January, 1864, and was, on the application of deponent's said attorney, enlarged until the tenth day of February, 1864, and then in other respects corroborated the affidavit of Gooding. That the poll in the ward of St. David was closed, as in the statement in this cause is set forth, without deponent's consent, but by and with the consent of the agent of John V. Detlor, who opposed deponent at said election. That the poll for St. Andrew's ward was closed on the second day of polling, and was then so closed at the instance and request of the agent of said Detlor, and by and with the consent of the agent of said John V. Detlor, who represented him at said poll for half an hour only, to wit, from one until half-past one, and after that time there were only two votes to be polled in said ward.

Other affidavits were filed on the part of defendant in corroboration of the foregoing, which it is unnecessary to state in detail.

Several affidavits were filed on the part of the relator, in answer to those of the defendant. The affidavits in answer were to the effect that the said so-called relation of Gooding was never intended to be a *bona fide* proceeding, but got up merely for the purpose of delaying and hindering this cause from being fairly and properly disposed of. That several of the strongest supporters of the said Watson openly admitted that such was their intention. That the proceedings in the said so-called relation were informal and otherwise defective, and that if the proceedings herein were to be stopped by reason of said relation, that a technical objection would be urged at the last moment, and defeat the object of the said so-called relation. That the object of said relation was to defeat this cause. That said proceedings were commenced and carried on for the very purpose of preventing said Watson from being removed from said office.

*M. B. Jackson* argued that this being the second writ issued against defendant for the same cause, it ought not to be proceeded with, or, if proceeded with at all, should be made returnable before the County Judge before whom the first proceeding was pending. (Con. Stat. U. C. cap. 128, sub. secs. 3, 4.) That it was positively sworn Gooding's relation was *bona fide* and not collusive. That to allow both relations to proceed would not only be contrary to law but most oppressive to defendant; and on the merits he argued the statute as to closing or not closing the poll is directory only, and cannot affect the validity of the election in the absence of a sug-

gestion that voters were thereby deprived of their votes. He also argued that defendant was not shown to be interested in a contract or contracts within the meaning of the statute. (Con. Stat. U. C. cap. 54, sec. 73.)

*Robert A. Harrison*, in support of the summons, argued that the pendency of the prior relation was no answer to this writ, but, if anything, a reason for moving to set it aside (*Smith* v. *Fisher*, 11 U. C. C. P. 161); that defendant having appeared, was bound to answer on the merits; that the prior relation, if open to defendant, was shown to be collusive, and so of no effect as against the present relation (*Kelly q. t.* v. *Cowan*, 18 U. C. Q. B. 104); that before the statute there might be several informations at the instance of several relators (*The King* v. *Slythe*, 6 B. & C. 244; *The King* v. *Bond*, 2 T. R. 770; *The King* v. *Eve et al*, 5 A. & E. 780); that the statute is a substitute for the former proceeding by information, and only requires the several writs to be made before the same Judge where issued at the instance of one and the same relator; that the proper remedy is to stay the proceedings, if in the same court, in all causes except one (*The King* v. *Cousins*, 7 A. & E. 285; *The Queen* v. *Alderson*, 11 A. & E. 3). But if in different courts or before different judges all may proceed, and at all events the present relator being really in earnest, ought not to be stopped. (*Reg.* v. *Alderson*, 11 A. & E. 3.) On the merits, he contended the cases were decisive. As to closing the poll before the hour appointed by statute, he referred to Con. Stat. U. C. cap. 54, secs. 101, 108, sec. 97, sub-sec. 7. The word "shall" is imperative, not directory (Con. Stat. U. C. cap. 2, sec. 18, sub-sec. 2). *Hall* v. *Hill*, 22 U. C. Q. B. 578; *Reg. ex rel. Arnott* v. *Marchant*, 2 U. C. Cham. R. 189; *Reg. ex rel. Coupland* v. *Webster*, 6 U. C. L. J. 89; *In re Charles* v. *Lewis*, 2 U. C. Cham. R. 171; *Reg. ex rel. Horne* v. *Clark*, 6 U. C. L. J. 114; *Reg. ex rel. Smith* v. *Brouse*, 1 U. C. Pr. R. 180. As to the disqualification by reason of the bond, he referred to *Reg. ex rel. Coleman* v. *O'Hare*, 2 U. C. Pr. R. 18; *Reg. ex rel. Bland* v. *Figg*, 6 U. C. L. J. 44; *Mayor of Clifton* v. *Silly*, 7 El. & B. 97; *Mayor of Cambridge* v. *Dennis*, 1 E. B. & E. 660; *Reg. ex rel. Moore* v. *Miller*, 11 U. C. Q. B. 465; *Reg. ex rel. Lutz* v. *Williamson*, 1 U. C. Pr. R. 94. As to the disqualification by reason of the license, which for a valuable consideration he contended was a contract, and referred to *Reg.* v. *Francis*, 18 Q. B. 526; *Reg. ex rel. Stock* v. *Davis*, 3 U. C. L. J. 128; *Reg.* v. *York*, 2 Q. B. 847; *Reeves* v. *The City of Toronto*, 21 U. C. Q. B. 157; *Simpson* v. *Ready*, 11 M. & W. 344; *Reg. ex rel. Crozier* v. *Taylor*, 6 U. C. L. J. 60.

Morrison, J.—I am quite satisfied that the defendant was, at the time of the election, disqualified upon the ground of the existence of the bond to the corporation, to which he was a party. This, without reference to the other grounds taken against the election, is, in my opinion, sufficient to make void the election so far as defendant is concerned. Being of this opinion, I do not think I should withhold my judgment by reason of the alleged pendency of the relation at the instance of Mr. Gooding, and I shall therefore hold and adjudge that the defendant has usurped the office of mayor for the town of Goderich, under pretence of the election held on the fourth and fifth days of the month of January last, and order the issue of a writ for his removal from the said office.

Order accordingly.

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### Reg. ex rel Doran v. Haggart.

*Con. Stat. U. C. cap. 54, sec. 135—Offices of Mayor and Reeve not to be held by one and the same person.*

*Held*, that the mayor of a town not withdrawn from the jurisdiction of the county or united counties within which situated, though the head of the council and chief executive officer of the corporation, is not a member of the council within the meaning of section 135 of the Municipal Institutions Act, so as to be eligible, if chosen, to hold the office of reeve; in other words, that the offices of mayor and reeve cannot in such case be holden by one and the same person.

[Chambers, March 7, 1864.]

The relator complained that John Haggart, of the town of Perth, esquire, mayor of the said town of Perth, had not been duly elected, and had unjustly usurped the office of reeve of and for the said town of Perth, one of the municipal corporations, situate within and composing part of the municipal corporation of the united counties of Lanark and Renfrew, and not withdrawn from the jurisdiction of the council of the said united counties in which it lies, under pretence of an election, held on Monday, the 18th day of January, 1864, at the said town of Perth, in the county of Lanark; and declared that he the said relator had an interest in the said election as one of the councillors for the east ward of the said town of Perth, and *ex officio* a voter at and upon an election of reeve of and for the said town of Perth; and showed the following causes why the election of the said John Haggart to the said office should be declared invalid and void: First, that the said election was contrary to law, and was void in this, that before and at the time thereof the said John Haggart was, and thence hitherto hath been and still is, mayor of the said town of Perth, having theretofore been lawfully elected to be mayor of the said town; and having accepted the said office of mayor, and exercised the functions thereof, the said John Haggart, not having been at any time elected to be a councillor for any of the three wards into which the said town of Perth then was and still is divided, was not an eligible person to be elected to be reeve of and for the said town of Perth, nor in any manner entitled to fill or hold such office of reeve. Second, that before and at the time of the said pretended election to be reeve, the said John Haggart, as mayor of the said town of Perth, and by law head of the corporation thereof, was actually presiding as such mayor at a session of the council thereof, and, being such mayor, was not at the same time eligible for election as reeve of the same corporation, nor in any manner entitled to hold or exercise the functions of both offices of and for the same corporation. Third, that the said John Haggart was not duly or legally elected or returned as such reeve of the said corporation, in this, that the said John Haggart never was a councillor for any of the wards of the said town of Perth, nor was he ever in any manner a member of the council thereof, except in so far only as his election by the ratepayers of the said town to the said office of

mayor may constitute him a member of the council thereof. Fourth, that the said John Haggart has accepted the said office of reeve, and has been and still is attempting to hold and exercise the functions of both the said offices of mayor and reeve of and for the same corporation of the said town of Perth, contrary to law. Fifth, that the said John Haggart was not duly or legally elected or returned as such reeve as aforesaid, in this, that he the said John Haggart, as mayor, presided over and conducted the said election of reeve, and was his own returning officer, so far as such last mentioned election was concerned.

The relator made oath, that the town of Perth, in the county of Lanark aforesaid, was not withdrawn from the jurisdiction of the council of the united counties of Lanark and Renfrew, in which the said town lies, and of which it forms a part; that the said town is divided into three wards, each of which annually elects three councillors, to form, with the mayor of the town, the municipal council of the corporation thereof; that at the annual municipal election in and for the said town of Perth, held on the 4th and 5th days of January, 1864, and for that year, John Haggart, of the said town of Perth, esquire, was duly elected to be mayor of the said town of Perth for the said year 1864, the said John Haggart having been duly nominated as one of the candidates for that office, according to the statute, on Monday, the 21st day of December, 1863, previously; that on the 18th day of the said month of January, 1864, the said John Haggart accepted the said office of mayor, and made and filed his declaration of office as such, and took his seat as mayor in the council of the corporation of said town; that the said John Haggart has since hitherto held the said office of mayor of the said town, and exercises the functions thereof; that at the same municipal election for the said town for the said year 1864, held on the said 4th and 5th days of January, 1864, the following persons were duly elected as councillors for the respective wards of the said town, namely, for the west ward Duncan Kippen, John Hart and Robert Douglas, for the centre ward Warren Botsford, William O'Brien and Robert Allan, and for the east ward George Cox, Robert Elliott and the relator; that on the said 18th day of January, 1864, the new council of the said town met, and all the said councillors, without exception, accepted their respective offices as councillors, and made and filed the declaration of office as such, as required by law; that at such meeting of the said new council, on the said 18th day of January, 1864, after the said declaration of office had been so made and filed by the said mayor and councillors, the election of a reeve and deputy reeve to represent the said town of Perth for the said present year 1864, in the council of the corporation of the said united counties of Lanark and Renfrew, was then commenced and proceeded with; that thereupon John Hart moved, and Duncan Kippen seconded, that John Haggart, the said mayor, be elected reeve of and for the said town for the said present year 1864; that the following councillors, namely, Duncan Kippen, John Hart, Warren Botsford and Robert Allan, and the said mayor, John Haggart himself, voted for the said motion that the mayor be elected reeve as aforesaid, and all the remaining councillors, namely, Robert Douglas, William O'Brien, George Cox, Robert Elliott and the relator voted against the same; that a tie having thereby been produced on the said election of reeve, the said mayor John Haggart, claiming to be the highest-assessed member of the said council on the assessment roll of the said town of Perth, then gave a second and casting vote in favor of himself, and then declared himself elected as reeve of the said town for the said year 1864 accordingly; that when the said mayor was so proposed for election as reeve as aforesaid, and before any of the said votes were taken, deponent, as one of the said councillors, stated and objected, in the presence and hearing of all the said councillors, and of the said mayor himself, that he the said mayor was not eligible for the said office of reeve, and that it would be illegal for him to take or hold the same; that the said John Haggart presided as mayor during the whole of the said session of council, including the said election of reeve, and was in fact his own returning officer on the said election of reeve; that on the 26th day of January, 1864, the said John Haggart made and signed the declaration of office as such reeve of the said town of Perth, and thereafter took his seat as such reeve in the council of the corporation of the said united counties of Lanark and Renfrew accordingly; that the said John Haggart held both the said offices of mayor and reeve of and for the said year 1864, and claims and insists on the right to exercise the functions of both offices.

*R. A. Harrison*, for the relator, cited Con. Stat. U. C. cap. 54, secs. 101, 102, 116, 120, 135, 144 & 145; *Reg. ex rel. Pollard* v. *Prosser*, 2 U. C. Prac. R. 330; Statute 24 Vic. cap. 37.

——— shewed cause.

John Wilson, J.—The mayor of a town is chosen by the electors, at the annual election holden on the first Monday in January (Con. Stat. U. C. cap. 54, sec. 101). His qualification is the same as that of an alderman in cities, and of a councillor in towns (*Ib.* sec. 102; see also *Reg. ex rel. Bender* v. *Preston*, 7 U. C. L. J. 100). He is deemed the head of the council, and the head and chief executive officer of the corporation (*Ib.* sec. 120), but is not, in my opinion, a member of the council within the meaning of section 135 of the act, so as to be eligible for the office of reeve. It is by section 144 of the act provided, that in case of the death or absence of the head of a town council (viz., the mayor), the reeve, &c., shall preside. So by section 145 it is provided that in the absence of the head of the council (the mayor), and, in the case of a town, in the absence also of the reeve, and also of the deputy reeve if there be one, the council may from among themselves appoint a presiding officer. These enactments are quite inconsistent with the idea that the offices of mayor and reeve may be held by one and the same person, and strengthen the interpretation which I have placed upon section 135 of the act. I therefore adjudge that the defendant hath usurped and doth still usurp the office of reeve for the town of Perth, and that he be removed therefrom.

Order accordingly.

## COMMON LAW CHAMBERS.

(*Reported by* Robert A. Harrison, *Barrister-at-Law.*)

### Lee et al., Judgment Creditors v. Gorrie, Judgment Debtor, and The Edinburgh Life Assurance Company, Garnishees.

*Con. Stat. U. C., cap. 22, sec. 284—Garnishee proceedings—What a debt due or accruing due—Discretionary power—Construction of deed of assignment for benefit of creditors.*

Where the judgment debtor, subsequent to the making of a general assignment for the benefit of creditors, surrendered a life policy to the garnishees at its value, "the proceeds to be placed at his credit on the principal and interest," due on a mortgage made by him on real estate, and held by the garnishees, and the garnishees accepted the surrender, but on terms different to those proposed, it was *held*, in the absence of an assent by the judgment debtor to the change in the terms, that the proceeds of the policy could not be attached as a debt due or accruing due from the garnishees to the judgment debtor.

*Quære*, has not a judge a discretion in the case of an attachable debt to decline under special circumstances to make an order to pay over the amount where such an order would be inequitable, or have a tendency to give one creditor a preference over others, after the making by the judgment debtor of a general assignment in favor of his creditors without preference or priority?

*Quære*, are the words "all bills, bonds, rates, securities, accounts, books, book debts, and documents securing money," contained in a general assignment for the benefit of creditors, sufficient to pass a policy at the time existing on life of the assignor, and held by him for his own benefit.

[Chambers, November 12, 1864.]

On 5th November last the judgment creditors, upon the usual affidavit, obtained from Chief Justice Richards an order attaching all debts due and owing or accruing due from the above-named garnishees to the above-named judgment debtor, to answer a judgment recovered by the judgment creditor against the judgment debtor on 17th November, 1861, in the Court of Queen's Bench for Upper Canada; and by the same order the judgment debtor and the garnishees were called upon to shew cause why the garnishees should not pay the judgment creditors the debt alleged to be due from them to the judgment debtor, or so much thereof as would be sufficient to satisfy the judgment debt.

*Blain* shewed cause for the judgment debtor.

He filed an affidavit made by the judgment debtor, wherein it was sworn that sometime in 1858, he applied to and obtained from the Edinburgh Life Association a policy on his life for £1000; that by the terms of the said policy he was at liberty to apply all bonuses accruing due on the said policy in reductions of any premiums that might fall due and become payable to the said company by him; that any person who insures his life in the said company becomes a member thereof, and entitled to apply thereto for such loans as he may require; that being a member of the said company he applied to and obtained a loan of one thousand pounds on a mortgage executed by him in favor of the said company, in which said mortgage there was, to the best of his knowledge and belief, a clause to the effect that the said company should apply all moneys due or accruing due under the said policy in payment of the amount due or accruing due on the said mortgage to the said company; that he obtained one George Leslie to become his surety to the said company for the due payment of the interest on the sum so borrowed, and he did become such surety, knowing that the said company could apply the said bonuses in reduction of the rent due on the mortgage; that it was also agreed between himself and the said company, and was covenanted in the said policy to the best of his recollection and belief, that in his option the bonuses accruing due on the policy should be applied in payment of the premiums due or accruing on the said policy; that on one occasion the said company did apply the bonuses due to him on account of his indebtedness to them; that being unable to pay the premium on the said policy he offered to surrender the same to the company, provided they would apply the amount which should be found due to him on account of the said mortgage; that his offer was brought before the board of directors of the said company, and the company resolved to allow him a certain sum for the surrender, which sum, together with certain bonuses due to him on the said policy, form the amount sought to be attached in these proceedings; that before the said bonuses or the said sum allowed for the surrender accrued due to him on on the said policy or by virtue thereof, he had made default in the payment of the amount secured by the mortgage, and there was, when the above sums accrued due to him, the amount secured by the said mortgage due and payable to the said company; that the terms of his surrender to the said company are set forth in the following letter—

Toronto, Oct. 1, 1864.

David Higgins, Esq.

Dear Sir,—I beg to apprise you that from utter inability to pay the premium due on 6th instant, on the life policy from your Company, No. 6898, for one thousand pounds sterling, I have resolved to abandon the same to the Company for its value, to be placed to my credit on the principal debt and interest due, and to that end I hereby surrender the same, which accompanies this communication. Of my crops this year I have not reaped the seed, except in barley, and of that not enough to pay for the labour expended. Under all the circumstances, and as I have paid the Company a very large amount in the shape of premiums and interest upon these policies, which is now an absolute profit (the risk having ceased) except the bonus, I trust the Company will act liberally in the premises. I am ready to execute a formal surrender.

Truly yours, W. M. Gorrie.

That he was not now the owner of the land upon which the said mortgage was executed, but the same was owned by one Thomas Gordon, assignee for the benefit of his creditors; that on November 17, 1863, he executed an assignment to the said Gordon, assigning all his property and effects to him, for the benefit of his creditors generally; that deponent handed the said letter, with the policy, to Mr. Higgins, secretary for the Company, and he said he would bring the matter before the Board; that deponent called subsequently and saw the said Higgins, and he informed deponent that the Company had accepted his surrender.

No one shewed cause for the garnishees.

*Thomas Wells* in reply, filed an affidavit of Mr. David Higgins, who swore that he was the secretary to the Toronto Local Board of the Edinburgh Life Assurance Company above named,

and as such secretary had the general management of the Toronto office, and was acquainted with all the particulars in connection with the policy and mortgage referred to by Mr. Gorrie in his affidavit filed on the application; that it was not correct, as stated in said affidavit, that said Gorrie executed a mortgage to the said Company for a thousand pounds, but it was given to the Honorable John Hillyard Cameron, and by him assigned to the said Company, the garnishees, the sum being only eight hundred and twenty-five pounds sterling, and not a thousand pounds, as stated by said Gorrie; that the said Leslie, mentioned in the fourth paragraph of said affidavit, did not execute the bond whereby he became bound for the payment of the interest by said Gorrie on such mortgage to the said the Edinburgh Life Assurance Company, but the same was given to said John Hillyard Cameron as security for him for his interest, and the said policy was issued by the said Company to Gorrie long before the execution of the said mortgage and bond by Gorrie and Leslie respectively to said Cameron; that at the last meeting of the Board of Directors of said Company in Toronto, on Friday last, they accepted the surrender of said policy by said Gorrie, but not in the terms of his application as contained in said letter of his referred to in his affidavit, and they ordered the surrender value thereof to be paid him; that after the meeting of said Board, said Gowie came to him at his office, and he then informed him the Board had agreed to accept his surrender in the terms mentioned in the preceding paragraph of this affidavit.

Richards, C. J.—The assignment from Gorrie to Gordon of his property for the benefit of his creditors is dated 17th November, 1863. In addition to specific property assigned, it transfers "all bills, bonds, notes, securities, accounts, books, book debts, and documents securing money," belonging to Gorrie, and also "all books of account relating to his business transactions."

I am not prepared at present to decide that the policy of insurance referred to would pass by the words used, which I have quoted, but if it were of any value it ought as much as any other property or effects to have been assigned.

From the papers produced before me, and from what took place at the argument, I have no doubt the insurance company held the mortgage of the judgment debtor, whether given to them by him direct, or to Mr. Cameron, and by him assigned to the company.

There is no doubt that it is to the debt and interest secured by this mortgage Mr. Gorrie refers in his letter to the company of 11th October, professing to surrender the policy to them at its value, "to be placed at his credit on the principal debt and interest."

It is equally free from doubt that the company accepted the surrender and agreed to allow Mr. Gorrie the amount in dispute; but the secretary of the company states that the company did not accept it on the *terms* mentioned in Mr. Gorrie's letter, "that the sum was to be paid to Mr. Gorrie," and he so informed him.

It is not stated that Mr. Gorrie agreed to such a change in the appropriation of the money, or in any manner assented to it, and as the appropriation made by him was more in accordance with what the law at the time approved on the application of an insolvent's property, to pay all of his debts equally, and not the debt of one particular creditor, I ought to aid that mode of applying it, rather than order it to be given to the judgment creditor.

If the acceptance of the surrender or abandonment of the policy by the company is not in the terms contained in Mr. Gorrie's letter, then there has been no proper acceptance of it, and no money to be attached. If the company have accepted the surrender, they have no right to impose terms to which Mr. Gorrie did not assent.

Looking at the facts as they are presented to me, I do not think that the amount sought to be attached can be attached. Even if it were a debt that could be attached, I should, if it be a matter in which I have the right to exercise a discretion, decline under the circumstances of the case to aid the judgment creditors.

Summons discharged.

## CHANCERY REPORTS.

(*Reported by* Alex. Grant Esq., *Barrister at Law, Reporter to the Court.*)

### Weir v. Weir.

*Alimony—Co-habitation.*

The right of a wife is to reside with her husband, in his home or in the joint home of both: where, therefore, it appeared that the husband resided with his children, (by a former wife), and compelled his wife to live at lodgings, the court, although no violence or other ill-treatment was shewn on the part of the husband towards his wife, made a decree for alimony in her favour; and that, although it was shewn that during such time the husband had been in the habit of visiting and remaining with his wife.

This was a suit for alimony, under the circumstances stated in the head note, and came on for the examination of witnesses and hearing before his Lordship the Chancellor at the sittings of the Court at Ottawa, in October last.

*Radenhurst* for the plaintiff.

*McLennan* for the defendant.

Vankoughnet, C.—This case is somewhat a singular one. The plaintiff sues her husband for alimony on the main and indeed only ground on which the right to it here can rest, that the defendant will not receive her into his own house and home, or does not receive her there under such conditions, as enables her or makes it her duty to remain there with him. The facts are shortly these. The plaintiff and defendant were married some five or six years ago. The defendant then, and ever since, has had his home at a place called Spencerville, on the line of the Ottawa and Prescott Railway, and a few miles in rear of Prescott. At the time of his marriage he was a widower, with a family by his former wife, some of whom had reached man's estate, and the others were in near approach to it. To his family, his marriage was most distasteful. His sons and daughters lived with him at what was known as the homestead—the home referred to —and, from the evidence given by some of them before me, they appear to have resolved from the first that the plaintiff should neither enter nor live in their father's house. It does not appear that the defendant himself was unwilling to

receive her there, but, overborne by his children of the former marriage, he seems to have acquiesced in their objections, and not to have exercised either his parental authority or his rights as *magister domi* to secure for his wife a place in his home. The result has been that for years he has been supporting and maintaining her at hotels, occasionally visiting her and having with her the intercourse which marital relations justify. In answer to the plaintiff's appeal for a fixed alimony this intercourse is set up in bar, and it is said that it amounts to, and answers all the obligations which are understood by, cohabitation, and which marital rights demand. On a motion before me to dismiss the bill for want of prosecution (*interim* alimony having been granted), and again at the hearing of the cause, I stated emphatically my opinion that cohabitation did not mean simply the intercourse of the parties, and the more especially when that was accidental and occasional, as in this case, and that it means the living together of the man and woman as husband and wife in the home of the former, or in their joint home, wherever that might be, and that it never could be tolerated that a man, a husband, might dwell in his own ascertained home and compel his wife to live in an inn or boarding-house, or other place, visiting her as he pleased, and be at liberty to say that she was thus in full possession of her conjugal rights, and that he was doing his duty by her. Fancy for a moment what the state of society might be if such a monstrous doctrine were admitted? A man living, perhaps, in luxury, in his own house, stopping short of that crime which might entitle his wife to a divorce absolutely, and yet leaving her to live at a place of public entertainment, not only without his society and the privacy and comfort of that home for which every married woman bargains when she casts in her lot with him she weds, but exposed to an acquaintance with any and every one who may in such a place intrude himself upon her. Forsaken, deserted and alone, under such circumstances, can any man dare to say she enjoys those rights which the married state confers upon her? In a suit in the ecclesiastical courts in England, for the restitution of conjugal rights, the common sentence of the court is, "That the husband receive his wife home as his wife, and treat her with conjugal affection." It is argued here that because the wife has, in the different places in which the defendant has procured her an abode, received him as her husband, and had sexual intercourse with him, she has submitted to her condition and debarred herself from complaining. I think not. She has shewn but a desire to maintain her marital connection with her husband, to yield to him as such, to afford him no cause of complaint, and to prove to him her desire to continue to him the duties of a wife at any sacrifice. This the courts in England could not have enforced upon her any more than upon him: for while they can enforce co-habitation they cannot compel intercourse. I do not think that her submission in this respect can be urged against her plaint, or treated as any condonation of the wrong which her husband does her in not taking her to his home. It is also alleged that the defendant is quite willing to receive her into his house, but how? While there is proof that he once himself brought her there, and that he again told her she was welcome to come; what we find was, on the occasion he did bring her there, and would probably be again her treatment if she ventured a visit, the eldest son of the defendant, a young man of 24 years of age, tells us—he says, when his father and the plaintiff arrived in a carriage in the yard adjacent to the house, he, the son, took the horse by the head, turned him round, and led him, and the carriage, with the plaintiff and defendant in it, out of the premises. In fact he turned them out again; he would not let the plaintiff enter; and he swears that neither he nor his brothers and sisters will have her there. In fact, as I understand him, she has only to enter to be ejected. The defendant submits to this action of his children. Is the plaintiff bound to do so? I think not. If the defendant cannot protect her in his own house, she is justified in keeping out of it, and compelling the defendant to make to her a proper allowance to support her elsewhere. She is willing to go to him. It is his duty to receive her, and to maintain her in his house free from assault, and from the insults of others, even though they be his own children. If his parental authority be not sufficient to restrain them, then his duty is to remove them out of his wife's way. His first duty is to her, to cleave to her, leaving all others beside; and if he is not prepared to do this, then he subjects himself to the only penalty which this court can inflict, as it does now, namely, an order to pay to her a fitting sum (to be settled by the Master) for her permanent maintenance, by way of alimony.

I have delayed judgment in this case in the hope that the parties might come to some arrangement among themselves; though I confess, from what I heard in evidence, and what I saw myself in the case of the defendant's gross misconduct, I had but faint hopes of his doing anything that was proper.

## GENERAL CORRESPONDENCE.

*County Courts—Pleas to the jurisdiction—Interlocutory judgment.*

To the Editors of the Law Journal.

Gentlemen,—You will oblige your many subscribers in this place by inserting the following "judgment" in a case argued here.

A. brought an action against B. for trespass to land in the township of B. Defendant pleads—1. Not guilty. 2. Not possessed. 3. Leave and licence, accompanying the 2nd plea with the affidavit required by section 20 of the County Courts' Act. Plaintiff signed judgment and gave notice of assessment. Defendant made application to have interlocutory judgment and subsequent proceedings set aside.

It came on for argument before the judge in chambers, and the following "judgment"

was given in writing:—"I think the judge "can do nothing as to the issue. No such "issue could be properly raised."

"Judgment should not be signed. Any "order of the court on the judgment would "be objectionable. Any step under this "proceeding would be useless."

"A question of title to land cannot be "tried; *a fortiori* it cannot be disposed of "without a trial. Interlocutory judgment "set aside. Silent as to costs."

Yours truly,

Goderich, Dec. 24, 1864. Lex.

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*County Judge granting order in Superior Court cause—Stamps.*

To the Editors of the Law Journal.

Gentlemen,—Where a statute gives authority to a County Court judge to issue an order in the Superior Court, for instance, that an attachment should issue, is this a Superior or County Court order, and what character of stamps would it require, and for what amount.

Yours truly,

A Subscriber.

Brantford, Feb. 15, 1865.

[Every case must depend upon the statute authorising the proceeding under it. If the proceeding be a step in a cause pending in a superior court, we think that the stamps there required would be necessary. In the case put by our correspondent we have no doubt but that the same stamps are necessary whether the order for a writ of attachment is issued by a superior or a county court judge.—Eds. L. J.]

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*Profession of the Law—A learned profession—Necessity of keeping it so—Suggested remedies.*

To the Editors of the U. C. Law Journal.

Gentlemen,—It is with pleasure that I notice a communication in your last number from the pen of "A Barrister," relative to the adoption of some efficient scheme, by which the profession of the law may be raised to a higher standard, and the influx into its ranks restrained within legitimate bounds. Not that I, more than yourselves, think favourably of *all* the plans mooted in his letter; but that I believe him to have drawn the attention of the Benchers to a most important question, and one which craves their immediate and careful consideration.

It cannot but occasion serious alarm to every reflecting practitioner when he considers the unparalleled rapidity with which lawyers have multiplied within the past few years, and the number of aspirants who are now entering, and preparing to enter, the profession. Scores of young men present themselves for the primary examination in every term, and are "passed." It is impossible to estimate the injury which the country and the profession sustain in thus allowing practitioners to multiply.

The profession of law is already crowded with eager and needy practitioners, who, lacking the ability to take an honourable position among their compeers, are driven to the necessity of eking out a scanty subsistence by means of petty chicanery—lending their assistance to designing clients for the purpose of frustrating the ends of justice. In this way, men who in other spheres of life would be useful to society—as agriculturists or mechanics—are, by the force of circumstances, rendered a reproach to themselves and of serious injury to the community in which they dwell.

The Provincial anxiety must necessarily be to have the profession of the law practised by able and respectable men, men of learning, men of virtue; men whom the study of law has so imbued with respect for its sacred character and maxims, as instinctively to shrink from the commission of wrong. The influence of solicitors on the Province is immense; it is through them that litigation, for the most part, is commenced; it is into their hands that clients are constantly entrusting their property, reputation, and dearest interests in life, depending upon their integrity, learning and judgment, for the proper administration of their affairs.

Contemplating the profession in this light, and regarding it as a high and honourable calling, it cannot be doubted that it is for the interest of the public and the profession, that it should be practised by learned and reputable men. Law is the great safeguard of the people, their most powerful protector, their inflexible friend: blot it out, or impede its free course of justice, and you wrest from their grasp the keystone of their liberties, the pledge given them for the strict observance of their rights.

This has been well expressed by the poet in the following lines :—

"If there be any land, as fame reports,
Where *Common Laws* restrain the prince and subject.
A happy land, where circulating pow'r
Flows through each member of the embodied state;
Sure, not unconscious of the mighty blessing,
Her grateful sons shine bright with every virtue;
Untainted with the lust of innovation—
Sure all unite to hold her league of rule
Unbroken as the sacred chain of nature
That links the jarring elements in peace."

Assuming, then, that such ought to be the character of every respectable barrister, these questions naturally present themselves. Do the lawyers of Upper Canada, as a body, bear that character? Are the Benchers of the Law Society pursuing that course, in reference to the qualifications of a barrister, calculated to lead to this desirable result? If not, what measures should they adopt?

With the first query your correspondent has nothing to do; upon the others, with your permission, a few comments will be offered, and in doing so, some of "A Barrister's" suggestions will be collaterally referred to.

Acquainted as we are with the frailties of our nature, and knowing how far short of perfection all human rules must fall, it would be folly in us to expect, whatever the regulations of the Law Society might be, that they would in all cases secure the desired ends. But that a great step towards improvement would be the raising of the standard of examinations, cannot, I think, be for a moment questioned by those who have any knowledge of what these examinations now are. Take, for example, the primary, and let us examine the amount of learning requisite to "*pass*." On looking at it, we find two books of Horace, and three of Geometry—absolutely nothing else. You may be wholly ignorant of English Grammar, know nothing of history, may never have seen an Algebra, or not know how to work a question in simple interest; your geographical information may be so general that you are in doubt whether Canada is north or south of the equator; your acquaintance with the great authors who have adorned the literature of our country may be so extensive as not even to know their names; yet, if you are able to translate four lines of Horace, answer a few simple questions upon the parsing, and can go through one proposition in Geometry, (it may be by rote) you will be admitted as a member of the Law Society, and duly enrolled as a student of the laws.

In the name of common sense is not this a farce! Is it not high time that such an examination should undergo regeneration? My firm conviction is, that this examination will be found the great bait alluring so many to the study of law. It is supposed to be an easy life, an honourable profession, and, more than all, very easily obtained. It is regarded by most ignorant young men, not as a mountain, steep and toilsome in its ascent, whose top alone is crowned with verdure; but as a valley, filled with fruit, through which every careless wayfarer may pass and regale himself at pleasure. By them it is not looked upon as a science containing the sparks of all the sciences in the world; but as one whose characteristics are those of subtlety and impudence. So long as this impression pervades the public mind, it is easy to understand why so many rush unthinkingly into the profession of law.

It has, I understand, been contemplated by the Benchers to compel all articled clerks to serve five years without reward for their services, and "A Barrister" proposes, as an improvement, that lawyers should form themselves into clubs, and agree to take in no clerks without a heavy fee; that the fees on all examinations should be doubled and in some cases trebled. These schemes appear to me very bad, and while productive of great evils, would not remedy those at present existing. It would only open a wide door to the sons of the wealthy, while the hard-reading sons of the poor would be excluded from the profession. The barrister's gown would be conferred on those who could pay for it; the honour would not be the result of patient, persevering study; and, in the course of time, we should look back with regret, and marvel at the intellectual giants who had given birth to a race of pigmies. This policy would be suicidal.

Let the Law Society give the public to understand that learning is required at the hands of every one aspiring to the bar. Let the people *feel* that it is a profession requiring a high degree of literary attainment. If the Benchers wish to raise the profession, they must strike at the roots of the disease. If they wish to exclude the stupid and ignorant, they must make the course of study severe, and one requiring energy and perseverance to master. They must make the profession

a *learned* one not in *name* alone but *in deed*. For we remember how Milton, who was master of nearly all the polite learning of his own time, has truthfully written that "learning, like an eagle in his mighty youth, spreading its wings far and wide, nerves the mind to vigorous action, and, purging it of shallow prejudices, kindles in the student the pure love of truth and justice." We all have seen the Latin aphorism—

> "Ingenuas didicisse fideliter artes
> Emollit mores, nec sinit esse feros."

Let the Benchers, instead of only making two books of Horace and three of Geometry the test of admission into the Society, compel all candidates to undergo a severe written examination (at least equal to the third year's examination in the University of Toronto) in English, Ancient and Modern History, Classics, and Mathematics, selecting those textbooks peculiarly adapted for training the mind, previous to entering upon their professional studies. Let graduates of colleges be compelled to submit themselves to the same ordeal, and to serve *five* years in an attorney's office instead of *three*. Let competent examiners be appointed, (probably some of the University professors could be engaged) and the number of marks necessary to be obtained placed high. Then, and not till then, may we hope to see the science of law restored to its pristine dignity, practised by men regarding it as a science, whose chief object is the upholding of justice and promoting the *componere lites*—the amicable settlement of litigious wranglings; and not *discordias alere*—the stirring up of malignant strifes. Then may we hope to see the profession filled with honourable men, looked up to by the people as men deserving of esteem, and desirous of promoting the welfare of the country.

Vox Populi.

February 21, 1865.

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[We are pleased to find that the letter of our correspondent "A Barrister," which appeared in our January issue has awakened so much attention. He touched upon topics of vital interest to the future welfare and good government of the profession in Upper Canada. The evils which he pointed out are known to exist, but the difficulty is to find appropriate remedies. No doubt men of imperfect education ought not to be admitted, and if the rules now in force admit such, the rules should be at once amended. So far we agree with "Vox Populi," and shall be glad to receive suggestions from him and others in furtherance of the object in view, in the hope that at some early day those who have the power may be enabled to use it rightly and discreetly. It is said that in the multitude of councillors there is wisdom—an adage of some application so far as the present discussion is concerned. —Eds. L. J.]

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*Law of away-going crops in Upper Canada.*

To the Editors of the Law Journal.

March 2, 1865.

On the first of December last, A. rents a farm from B. for ten years, at a fixed rent, and immediate possession is given to A., who enters at once, and having been upon the farm a few days, the tax collector calls and demands the taxes for the past year, they not having been paid; and as A.'s lease provides that he (A.) is to pay all taxes due and to become due, A. of course had no other alternative than paying up. The off-going tenant, who was farming the place on shares with B. (his landlord), has left two fields sown last fall with wheat. Your opinion is requested as to whom this wheat belongs; is not A. entitled to the whole, there being nothing mentioned in his lease with B. as to any party entering to take the wheat off?

An old Subscriber.

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[There is a notion prevalent that a tenant for a term of years has by the custom of the country the right to put in a fall crop during the last year of his tenancy, and after the expiration of his lease the right to go upon the land to reap it. In the absence of express stipulation in the lease the tenant, in our opinion, has no such right. If he quit the premises at the expiration of his lease, leaving a full crop in the ground, that crop under an ordinary lease as a part of the freehold passes to the landlord; and so if the landlord without reservation re-let the premises for a second term, the crops being at the time of the new lease in the ground, we apprehend the crop passes to the new tenant, as supposed by our correspondent: (See *Burrowes* v. *Cairnes*, 2 U. C. Q. B. 288; *Campbell* v. *Buchan*, 7 U. C. C. P. 70; *Gilmore* v. *Lockhart*, MS. R. & H. Dig., Lease I. 6.]—Eds. L.J.

*Lessor and lessee—Case imperfectly stated—Refusal to answer.*

To the Editors of the Law Journal.

Gentlemen,—Will you have the kindness to answer me the following question. If a lease of certain premises is made, say, for the term of six years, and the lessee has the privilege of taking the premises for the same time again, and supposing the lessee continues in possession of the premises for one year after the lease expires, would he be obliged to continue in possession for the full time of another six years; or, what amounts to the same thing, would he be liable for rent for any longer time than the one year, no new lease or agreement being made or asked for by the lessee? By answering the above question your will confer a great obligation on

Yours,

A Law Student.

[We have no objection to answer questions of general interest to our readers, but cannot undertake to advise upon cases of interest only to the particular inquirer. The above communication we class among the latter, and so must decline to answer it. Even if disposed to answer it, we could not do so upon the case as stated, without seeing the lease or a copy of it, supposing it to be in writing, and without knowing whether or not it is under seal. The case had better be properly stated and submitted to counsel, with a fee for his opinion.—Eds. L. J.]

*Equitable Mortgage—Registration.*

To the Editors of the Law Journal.

Gentlemen,—Sec. 44, cap. 89, C. S. U. C., provides that an "Equitable Mortgage must be registered before it can prevail against a second mortgage, &c."

Secs. 19 & 20 fully set forth the requisites of every Memorial to be registered.

I cannot understand how such a Memorial is to be made for the registration of an Equitable Mortgage—how an Equitable Mortgage can be registered.

An explanation will be of interest to many of your readers.

Yours, &c.,

A Student.

Kingston,
March, 3, 1865.

[We are as much at a loss to understand the meaning of the enactment to which our correspondent refers as our correspondent himself.

We have always understood that an Equitable Mortgage arises upon an agreement to mortgage accompanied with a deposit of title deeds, or simply upon a deposit of title deeds without any express agreement. This being so, it is difficult to understand how a Memorial of it can be so prepared as to contain:

1. The date of the instrument, when there is none.
2. The names and addresses of the witnesses to the instrument, when there is none.
3. The land contained in the instrument, when there is none.

We understand that the subject of the registration of equitable mortgages is now before the Court of Chancery, in the case of *Harrison* v. *Armour*.]—Eds. L. J.

## JUDGMENTS.

### *QUEEN'S BENCH.*

Present: Draper, C. J.; Hagarty, J.; Morrison, J.

March 6, 1865.

*Robinson* v. *Gordon*.—Rule discharged with costs.

*In re Fennell and the Town of Guelph*.—Rule absolute to quash (1) The 2nd clause of by-law No. 75; (2) The 4th clause of same by-law; (3) The 3rd clause of by-law No. 80; (4) So much of by-law No. 84, as relates to poultry, eggs, cheese, grain, shingles, flour, wool, vegetables and fruit; (5) So much of 3rd clause of same by-law as relates to any persons not being hucksters or runners—with costs; and to discharge the rest of the rule.

*Keating* v. *Cassels*.—Judgment for defendant on special case.

*Baird* v. *Story*.—Judgment for defendant on demurrer.

*Covert* v. *Robinson*.—Rule discharged.

*Hogan* v. *Berrie*.—Rule discharged.

*Spence* v. *Hector*.—Verdict to be reduced by the amount of the interest, and discharged as to other points, without costs.

*Thornton* v. *Sandwich Plank Road Co.*—Verdict set aside, with leave to defendants to apply in chambers, within 14 days, to withdraw equitable plea, and to plead to whole declaration such pleas as judge may permit, or to plead to common counts, letting equitable plea stand. Leave to plaintiff to apply to amend, if advised. Costs to be costs in the cause.

*McLean* v. *Buffalo and Lake Huron R. Co.*—Rule discharged. Leave to appeal granted.

*Webster* v. *Harper et al.*—Rule discharged.

*Mason* v. *Morgan.*—Appeal dismissed with costs.

*Barton* v. *Town of Dundas.*—Rule discharged.

*Ottawa Building Society* v. *Scott.*—Rule absolute to reduce verdict, with costs to defendant.

*Leech* v. *Leech.*—Judgment suspended till second day of next term, to enable parties to make partition according to the expressed opinion of the court.

*Pearman* v. *Heyland.*—New trial on payment of costs.

*Coffin* v. *Danard et al.*—Rule discharged.

*Campbell* v. *Delehanty et al.*—Rule absolute to set aside nonsuit, and enter verdict for plaintiff.

*Hunt* v. *McArthnr.*—Action against a magistrate for maliciously and without probable cause arresting defendant. The evidence proved a trespass, and leave was reserved to enter a nonsuit. Rule absolute.

*Kingan* v. *Hall.*—Rule absolute for new trial, without costs.

*Knowles* v. *Post.*—The court refused rule, as they had no authority to interfere.

*Paterson* v. *Todd.*—Rule discharged.

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March 10, 1865.

*Banting* v. *Gummerson.*—Rule discharged.

*Thomas* v. *Great Western Railway Co.*—Postea to plaintiff.

*Green* v. *Wright.*—Judgment for defendant on demurrer.

*Bletcher* v. *Burns.*—Rule discharged.

*Bletcher* v. *Marsh.*—Rule discharged.

*In the matter of McLay and Hammond.*—Rule discharged.

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## *COMMON PLEAS.*

Present: Richards, C. J.; Adam Wilson, J; John Wilson, J.

March 6, 1865.

*Heuback* v. *Robertson.*—Appeal allowed without costs, and rule made absolute in court below to enter a nonsuit John Wilson, J., *dissentiente.*

*Franck* v. *Carson.*—Rule discharged.

*Spettigue* v. *Great Western R. Co.*—Rule absolute to enter a nonsuit.

*Miller* v. *Thompson.*—Judgment for plaintiff on demurrer to plaintiff's declaration.

*Featherstone* v. *McDonald.*—Rule absolute to enter verdict for plaintiff.

*Great Western Railway Co.* v. *Bain.*—Rule discharged.

*Nudel et al.* v. *Williams et al.*—Rule discharged.

*Squire qui tam* v. *Wilson.*—Rule discharged. A. Wilson, J., *dissentiente.*

*Reynolds* v. *The City of Toronto.*—Rule absolute to enter nonsuit.

*Lowell* v. *Todd.*—Rule absolute for new trial. Costs to abide the event.

*Scott* v. *Reikie.*—Rule absolute for new trial on payment of costs.

*White et al.* v. *Baker.*—Judgment on demurrer for plaintiff.

*Graham* v. *Stewart.*—Rule absolute for new trial, without costs.

*Harold* v. *Stewart.*—Rule discharged. Adam Wilson, J., *dissentiente.*

*McGuire* v. *Shaw.*—Rule absolute for new trial. Costs to abide the event.

*McNab* v. *Stewart.*—Rule absolute for new trial as to east half of lot in question, if defendant consent before 10th April: otherwise rule absolute to set aside whole verdict on payment of costs.

*Sloan* v. *Whalen.*—Rule discharged with costs.

*Gott* v. *Ferris.*—Rule absolute for new trial on payment of costs.

*Buchanan* v. *Frank.*—Rule discharged with costs. *Held*, that Sheriffs are not entitled to poundage, unless money *actually levied*, although it may have been made under pressure of writ.

*Baxter* v. *Boyne.*—Rule absolute for new trial. Nothing said as to costs, for statute makes them to abide event.

*Nickle* v. *Nickle.*—Rule absolute for new trial. Costs to abide the event.

*The Queen* v. *Ouilette.*—Conviction quashed.

*Hicks* v. *Godfrey.*—Judgment for defendant, on the demurrer to the declaration.

*In the matter of O'Neil and the Corporation of York and Peel.*—Rule discharged with costs.

*McLaughlin* v, *McLaughlin.*—Rule discharged (court having no jurisdiction in case cannot give costs.) *Held*, that a judge in chambers has no power to direct the trial of an issue.

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March 10, 1865.

*Attorney General* v. *Perry.*—Judgment for plaintiff.

*Greaves* v. *Hilliard.*—Rule absolute to enter nonsuit.

*McKinley* v. *Munsie.*—Rule absolute to enter nonsuit. John Wilson, J., *dissentiente.*

*Northern Railway Co.* v. *Patton et al.*—Rule absolute for new trial on payment of costs.

*Date* v. *Gore District Insurance Company.*—Rule discharged.

*Wilkins* v. *Row.*—Rule discharged.

*Paterson* v. *Bates.*—Rule discharged.

*Twohy* v. *Armstrong.*—Rule absolute for new trial on payment of costs, and rule for plaintiff on demurrer.

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## INSOLVENTS.

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| John Yuill | Tp. McNab. |
| H. C. Forsyth | Burford. |
| Christopher W. Richardson | Co. Wentworth. |
| Thomas Graham | Co. Wentworth. |
| Daniel L. Healy | Tp. Smith. |
| Lochman A. Cremmer | Waterdown. |
| John Thomson | Peterboro'. |
| Wm. Thomas Kiely | London. |
| Robert G. Pole | Hamilton. |
| Richard Murphy | Toronto. |
| John Murphy | Toronto. |
| John Breene | Mariposa. |
| Joseph Breene | Mariposa. |

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|---|---|
| Daniel Haggart | Peterboro'. |
| Willet Ferris | Pittsburgh. |
| John McKay, sen | Kingston. |
| Wm. Bennett | Port Hope. |
| John R. Babcock | Rednersville. |
| Henry Labelle | Vankleek Hill. |
| Job C. Thompson & Co | Montreal. |
| W. T. Ecclestone | Hamilton. |
| George Robertson | Oil Springs. |
| George S. Wilkes | Brantford. |
| Levi Beemer | Toronto. |
| Lewis Smith | Tp. Barton. |
| Wm. Wood | Sophiasburgh. |
| Nicholas Greely | Sophiasburgh. |
| Edwin Roblin | Picton. |
| Patrick Ryan | Montreal. |
| Jacob Casselman | Newcastle. |
| George W. Boggs | St. Thomas. |
| Henry T. McKichan | Hamilton. |
| Wm. Briscoe | Toronto. |
| Lawrence Lawrason | London. |
| John Swartz | Waterloo. |
| George Douglass Griffin | Hamilton. |
| Fisher Munro | Port Colborne. |
| James McMonies, jun. | Co. Wentworth. |
| Ebenezer Johnston | Tp. Ernestown. |
| Thomas J. Owens | Drayton. |
| Peter McCann | London. |
| Martin Hauck | Co. Waterloo. |
| J. C. Booth | Chambly. |
| Allan McQuarrie | Eldon. |
| J. J. Marshall | Mount Forest. |
| Angus McSween | St. Thomas. |
| McClellan & Co. | Montreal. |
| Rhinard Maybee | Manilla. |
| Nelson Storm | Kingston. |
| Samuel Lake | Newburgh. |
| James C. Macklin | Hamilton. |
| George H. Comer | Tp. Richmond. |
| Alexander McCallum | Cobourg. |
| Lewis B. Rose et al | Montreal. |
| Wm. Moon | London. |
| Wm. G. Strong | Cobourg. |
| Thomas Scott | Cobourg. |
| Hearn & Potter | Toronto. |
| Wm. Servos | Hamilton. |
| Lancaster H. Schofield | Whitby. |
| Elijah Lake | Oakwood. |
| Wm. McPhail | Cannington. |
| Lewis S. Wiswell | Cobourg. |
| L. A. Gurnett | Ancaster. |
| James G. Fraser | Galt. |
| Wm. McDonell | Hamilton. |
| John Campbell & Co | Co. Elgin. |
| Andrew Widdowson | Toronto. |
| Charles Patrick Reynolds | Toronto. |
| James R. Bradbury | Toronto. |
| Bradbury & Co | Toronto. |
| Alex. McLean | Mariposa. |
| A. A. Roy | Quebec. |
| P. T. Deguise | Quebec. |
| Archibald McIntyre | St. Thomas. |
| Wm. Ross | St. Thomas. |
| Samuel McClung | Bowmanville. |
| Catharine Lecours | Bienville. |
| Score & Brayley | Toronto. |
| Mackay & Co | Ottawa. |
| James Oliver | London. |
| Calvin W. Day, jr | Tp. Kingston. |
| Wm. T. Ecclestone | Hamilton. |
| John B. Orser | Picton. |
| Charles Carpenter | Hamilton. |
| Michael Graham | Tp. Brantford. |
| Wm. Tilt | Blair. |
| James Sutherland | Tp. Mariposa. |
| David Guthrie | Montreal. |
| Geo. R. Macnamee | Montreal. |
| Peter S. Filman | Tp. Barton. |
| Francis Y. Cowle | Bowmanville. |
| Alex Malcolm | Alliston. |
| McNaughton, Bros | Newcastle. |
| Luc Robert | Verchères. |
| Alex. Douglass | Brantford. |
| Geo. P. Hughes | Keenansville. |
| Ellis Luther Derby | Napanee. |
| W. Armstrong | Peterboro. |
| Henry Merick | Merrickville. |
| A. Lang | Barrie. |
| Wm. Walter | Tp. Vespra. |
| Vars & Strong | Colborne. |
| P. V. Dorland | Belleville. |
| Michael Mulrowney | Quebec. |
| James Capner | St. Catharines. |
| John B. R. Deacon | Cobourg. |
| D. A. Ross | Bath. |
| John Abbott | Tp. Kingston. |
| John Keating | Stratford. |
| Damase Guimont | Cape St. Ignace. |
| Atcheson Cleland | Lachute. |
| McCulloch, Bros | Montreal. |
| Thos. Ferguson | Vankleek Hill. |
| Abner E. Van Norman | Hamilton. |
| Peter Coleman | Bowmanville. |
| Thos. Moore | St. Thomas. |
| J. R. McCullogh | Bowmanville. |
| Adams & Co | Montreal. |
| Henry B. Paris | London. |
| John Black | Lambton. |
| Ezra Dean Priest | Bath. |
| Thos. B. Howell | Kingston. |
| Robt. N. Reynolds | Kingston. |
| Thos. C. Watkins | Hamilton. |
| Alfred Brown | Montreal. |
| John Burns | Montreal. |
| Alfred Cliff | Chickopee Mills. |
| George Parker | Sandhill. |
| J. B. Vezina | Quebec. |
| Simon Deeks | Morrisburg. |
| Wm. A. Nash | Morrisburg. |
| Chas. Cruickshank | Clinton. |
| Laberge & Peltier | Acton Vale. |
| Thos. Jackson | Sandhill. |
| Wm. Weeks | Woodstock. |
| James Blair | Napanee. |
| Joseph Bingham | Bradford. |
| Wm. Wood | Sophiasburgh. |
| Richd. Philp | Bowmanville. |
| James McFesters | Bowmanville. |
| David G. Ellis | Toronto. |
| Rae, Brothers & Co | Hamilton. |
| Walter Arnold | Niagara. |
| Robert Rutherford | Guelph. |
| J. T. Allin | Cobourg. |
| Hugh Edward Brown | Whitby. |
| William Warren, jr | Whitby. |
| James Blackwood | St. Thomas. |
| John C. Boswell | Tp. Hamilton. |
| Cosby Storey | Newboro. |
| James Feely | Norwood. |
| Duncan McDonald | Sarnia. |
| Pierre Poulin | Ste. Cecile. |

## APPOINTMENTS TO OFFICE.

### JUDGES.

WILLIAM DAVIS ARDAGH, Esq., to be Deputy Judge of the County Court of the County of Simcoe. (Gazetted February 11, 1865.)

### NOTARIES PUBLIC.

MICHAEL HAYES, of Toronto, Esq., Barrister-at-Law, to be a Notary Public in Upper Canada. (Gazetted February 18, 1865.)

WILLIAM LOUNT, of Barrie, Esq., Barrister-at-Law, to be a Notary Public in Upper Canada. (Gazetted February 18, 1865.)

THOMAS BABINGTON McMAHON, of Bradford, Esq., Barrister-at-Law, to be a Notary Public in Upper Canada. (Gazetted February 18, 1865.)

CHARLES ELDON EWING, of Wicklow, Esq., Barrister-at-Law, to be a Notary Public in Upper Canada. (Gazetted February 18, 1865.)

### CORONERS.

NEIL FLEMING, Esq., M.D., Associate Coroner. United Counties of Huron and Bruce. (Gazetted Feb. 11, 1865.)

JOHN WILSON, Esq., M.D., Associate Coroner, County of Norfolk. (Gazetted February 18, 1865.)

THOMAS AISHTON, Esq., M.D., Associate Coroner, County of Lennox and Addington. (Gazetted February 18, 1865.)

THOMAS FREER, Esq., M.D., Associate Coroner, United Counties of Lanark and Renfrew. (Gazetted Feb. 25, 1865.)

### REGISTRARS.

ALEXANDER McLEOD MACKENZIE, Esq., Registrar of the County of Glengarry. (Gazetted February 25, 1865.)

## TO CORRESPONDENTS.

"Lex" — "A Subscriber" — "Vox Populi" — "An Old Subscriber" — "A Law Student" — "A Student" — under "General Correspondence."

## DIARY FOR APRIL.

1. Sat .... Last day for notice of trial for York and Peel.
2. SUN ... *5th Sunday in Lent.*
3. Mon ... County Court and Surrogate Court Term com.
8. Sat. ... County Court and Surrogate Court Term ends.
9. SUN ... *6th Sunday in Lent.*
10. Mon ... York and Peel Spring Assizes.
14. Frid.... *Good Friday.*
16. SUN ... *Easter Day.*
23. SUN ... *Low Sunday. St. George.*
25. Tues... *St. Mark.* [Last day for Comp. Ass. Rolls.
29. Sat. ... Articles, &c., to be left with Sec. of Law Society.
30. SUN. .. *2nd Sunday aft. Easter.* Last day for Non-Res. [to give lists of their lands.

## NOTICE.

*Owing to the very large demand for the* Law Journal *and* Local Courts' Gazette, *subscribers not desiring to take* both *publications are particularly requested at once to return the back numbers of that one for which they do not wish to subscribe.*

THE

# Upper Canada Law Journal.

APRIL, 1865.

## LAW BILLS OF LAST SESSION.

The third Session of the Eighth Provincial Parliament closed on the 18th of last month.

The usual number of bills was introduced by members active, printed at the public expense, and then voted upon by members passive. Some of them introduced after much careful consideration and with the honest intention of remedying defects or supplying wants in the present law, and others merely introduced by members ambitiously desiring to appear to be doing something for their country, without for an instant imagining that their productions would go farther than being simply printed and distributed, or perhaps being read a second time and then thrown out.

The bill of fare was, of course, very promising, both as to quality and quantity.

In the Upper House we were promised by the Hon. Mr. Currie:—

An Act to amend the fourth sub-section of the fifth section and to repeal the sixteenth section of the Act for the better assignment of Dower.

An Act to prevent County Judges from practising as Conveyancers. We are sorry to contemplate the possibility of such a provision being necessary.

An Act relative to summary convictions by Magistrates, for the purpose of preventing the failure of justice arising from formal defects in Magistrate's orders and convictions, &c.

In the Lower House:—

An Act for quieting titles to real estate in Upper Canada; it being "expedient," it recites, "to give certainty to the titles to real estate in Upper Canada, and to facilitate the proof thereof, and also to render the dealing with land more simple and economical." This bill, introduced by the Attorney General, is similar to that brought in some time ago by the present Vice Chancellor Mowat. The subject is a very important one, and will require most careful legislation.

An Act to provide for the taxation and recovery of Arbitrators' fees. A Government Bill with the same object in view was introduced by the Attorney General, which proposed to fix a reasonable scale of fees to arbitrators, professional and otherwise, to provide for the taxation of the arbitrator's charges, and for any refusal or delay to make and deliver the award.

An Act to amend the Insolvent Act of 1864. No act requires amendment more than does this, and when done, it should be done effectually. We question, however, whether the bill, as introduced by Mr. Abbott, will effect all that is required. We trust that some of the Upper Canada lawyers in the House who are conversant with this important matter will give their careful attention to it. The attempt to make a general law applicable to two systems of jurisprudence, so dissimilar in their practice and procedure as are those of Upper and Lower Canada, has not been altogether successful.

An Act to alter the law of Dower, and to regulate proceedings in actions for the recovery of dower—a Government Bill, introduced by the Attorney General. The right to dower is gradually dwindling away. It is, in fact, very questionable whether it would not be advisable to do away with it altogether; but, be that as it may, this act proposes that dower shall not be recoverable out of land in a state of nature at the time of alienation by the husband (reserving the right of the doweress to wood for firing and fencing), nor when the demandant has joined in any deed to convey the land or release her dower therein to a purchaser for value, although there might have been some informality in the acknowledgment required by law, &c. It also proposes to alter the practice in dower suits, making the primary

proceedings analagous to actions of ejectment, and declaring that the pleadings and practice shall, so far as possible, be regulated by the Common Law Procedure Act.

But by far the most important Bill introduced was the Registry Act which has been so long promised us. Most of our readers are aware of the prominent features of it. We think we are safe in asserting that a Registry law, to be efficient, must be complete, stringent and thorough. Time has shown that half measures will not answer, and the tendency of legislation is towards a more complete system.

Mr. Scatcherd has, of course, introduced his usual advertisement—his clap-trap bill to reduce law costs, to which we allude in another place. We should feel deeply for *him* if such a piece of absurdity ever became law.

None of these bills, however, have as yet passed. In whatever stage they were when Parliament dissolved, so they remain until next session, which may possibly commence some time in July, though probably not till later.

The law bills that go into the Statute Book this Session are but few, and may be enumerated as follows:—

An Act to amend the Consolidated Statutes of Upper Canada respecting the Court of Chancery as to certain matters of jurisdiction, but principally with reference to proceedings in Lunacy cases. Practitioners in the Court of Chancery will be glad to see this Act as soon as possible. We publish it in another place.

An Act to improve the proceedings in Prohibition and on Writs of Mandamus in Upper Canada.

An Act repealing the eighth section of the Interpleader Act, and substituting a new section authorising interpleader proceedings for the proceeds or value of any lands taken and sold under an execution, &c. We publish the Act in another column.

An Act, introduced by Hon. J. H. Cameron, to amend the Act respecting Attorneys We are enabled, through the kindness of the Treasurer of the Law Society, to give our readers an early copy of this Act. It will, amongst other things, enable the Benchers to use their discretion in certain cases, in which their hands were formerly tied, and many of our friends amongst the students will be glad to see it.

## SHERIFFS' POUNDAGE.

The rights of sheriffs to poundage, in cases where a levy has been made, but no money has been actually realised, or, in other words where the money has not actually passed through the hands of the sheriff, but the writ has been satisfied in some other way, even though paid under pressure of the writ, has at length been judicially determined. We ventured an opinion in a former volume,* that, under such circumstances as we have mentioned, a sheriff would not be entitled to poundage, and our opinion has proved to be correct. Great doubt, however, has existed on the subject in the minds of the profession, and much confusion and annoyance was the consequence. The sheriffs of course contended for what they considered their rights, and debtors on the other hand, under the advice of the plaintiff's or defendant's attorney as the case might be, strongly objected to pay fees which there appeared a good excuse for not paying.

The subject has recently come up for discussion in the Court of Chancery before His Lordship the Chancellor in *Winters* v. *The Kingston Permanent Building Society*. He decided against the sheriff's claim, as will be seen in the report of the case in another column.

The case of *Buchanan* v. *Frank* brought the same subject before a Court of Common Law. This case was first fully argued in Chambers, and was subsequently heard in the Court of Common Pleas during last term. The judgment of the Court is decisive on the point that no right to poundage arises unless the money has been actually realised by the sheriff, even though the pressure of the writ may have been the cause of the satisfaction of the debt.

Another case, relating to poundage, came before the Court of Queen's Bench last Term, (*Thomas* v. *Great Western Railway Company*;) which turned upon the point whether or not a sheriff could maintain an action for his poundage against an execution debtor. The court decided in the negative, saying that the sheriff is in fact only the minister of the execution creditor, and therefore an action for poundage if maintainable at all, is only so against the execution creditor.

* 10 U. C. L. J. 113.

The law as laid down by the Chancellor and Court of Common Pleas will, in many cases, work a great hardship and injustice upon sheriffs, and not only upon them, but upon unfortunate debtors. The natural effect of it will be that sheriffs, instead of dealing leniently with debtors and facilitating any arrangement between the parties which would tend to the settlement or satisfaction of the debt without the loss and annoyance of a forced sale for cash, will proceed to make the money under the execution without delay, and perhaps entirely deprive the debtor of the power of making some settlement which might save him from ruin.

It is probable, therefore, that sheriffs will make some effort to have such a change made in the law, as will place themselves and execution debtors in a better position in the premises.

## COUNTY JUDGES—THEIR LABOURS AND THEIR PAY.

In the beginning of the present year, a circular was issued from the Bureau of Agriculture and Statistics, calling upon various public functionaries to answer a number of questions in relation to their offices, which information was wanted for the Blue Book of 1864. The following are the questions:

1st.—Name of office?
2nd.—Name (or names) of incumbent (or incumbents) within the year 1864?
3rd.—Date (or dates) of appointment?
4th.—By whom appointed?
5th.—Amount of annual salary?
6th.—Amount received in fees?
7th.—Remarks (if necessary).
8th.—Number of years of service as public officer in any capacity whatever, mentioning the date of first appointment?

One of these circulars was addressed to a County Judge, who, in answering the questions, gave some information which we hope our legislators will take a note of when they next propose to impose a few more labours upon their "beasts of burthen," as County Judges have been forcibly called.

The answers to the questions, as given by the learned gentleman that we allude to, are as follows:

1st.—The office I hold is Judge of the County Court of the County of ———.

2nd.—My name is ———.

3rd.—The date of my appointment was ———.

4th.—My appointment was by the Provincial Government, under the Great Seal of the Province of Canada, during the administration of —.

5th.—My salary is $2,600.

6th.—I receive a travelling allowance of $200, as Judge of the Division Courts. I receive fees as *ex officio* Judge of the Surrogate Court, which, in 1864, amounted to $70 50. I am paid $4 per diem as *ex officio* selector of jurors, under the U. C. Jurors Act, which, in 1864, amounted to $24.

7th.—*Remarks.*—As Judge of the County Court, I am *ex officio* Judge of the Surrogate Court; Judge of the several Division Courts of the County; Chairman of the Court of General Quarter Sessions of the Peace; a Selector of Jurors, under the Jurors' Act; a Ballotter of Militia, under the General Militia Law; an Auditor of Accounts connected with the administration of justice; with various other *ex officio* offices and duties to perform under several of the Railway Acts, the Extradition Act, the continued Bankruptcy Act, the Common Law Procedure Acts, the Chancery Act, the General Election Law, the Common School Acts, the Absconding Debtors' Act, the Act respecting Arrest and Imprisonment for Debt, the Municipal Acts, the Insolvent Debtors' Act, the Insolvent Act of 1864, the General Road Company's Acts, the Act respecting the Partition of Real Estate, the Act respecting the Registry of Deeds, &c., the Overholding Tenants Act, the Act respecting the Support of Insane Destitute Persons, several Criminal Acts, the Assessment Acts, and various other statutes (in all upwards of twenty), which I cannot enumerate or remember: for any one of which, (excepting for those I have named in my answers numbered 5 and 6 respectively, and the occasional duties under the General Election law), I receive no salary, fees or allowance—not even for stationery, light, fuel or travelling expenses. All these duties are imposed by the different statutes I have referred to; and there are some new duties imposed upon the County Judge almost every session of Parliament, without any remuneration or fees being prescribed therefor. No provision or pension whatever is provided in case of inability from old age, accident, exposure, or decay in the service.

8th.—I have been in this service as a public officer upwards of and during eleven years.

It is scarcely necessary for us to enlarge on this matter. We have already and oftentimes expressed our views upon the impropriety and injustice of heaping one duty after another upon the devoted shoulders of County Judges: broad indeed must they be to

bear them. Such a course is unfair to the Judges; and it is both unfair and unjust to the public, whose servants they are. It is contrary to public policy, and tends to the injury of public business. It never seems to strike our law-makers that, in the ordinary business of life, increased remuneration goes hand-in-hand with increased labours and responsibilities; but, according to the practic now in vogue, whenever anything in the shape of local administration has to be done, County Judges are to be the doers of it, and—get nothing for it. Their duties under the Insolvent Act of 1864, is a sufficient example of this, without going further.

We have long been expecting a change for the better in this respect; and though it is long in coming, come it must; and we shall continue, as heretofore, to condemn a practice which we consider most pernicious.

## PUBLIC TASTE IN HUMBUGS.

It has been said that the world is made up of knaves and fools—those that impose upon others, and those that are imposed upon. Mankind loves to be humbugged, and is humbugged accordingly. Every age has had its own peculiar species of vanity in this respect. In the good old times, the credulous public had wizards, witches, magicians, astrologers and such like; in these enlightened days we indulge in spiritualists, table-turners, electro-biologists, prestidigitators, clairvoyants, &c., according as fashion, fancy, or a clever humbug may lead the public taste.

The law does not trouble itself much about harmless nonsense of this kind, but leaves every one to please himself or herself as to the manner in which he or she will be cheated or humbugged. Occasionally, however, these "cunning" men and women, who claim to have familiar spirits at command, *ad lib.*, are too old-fashioned, or not sufficiently wide awake to cheat people after a legal fashion, particularly in some of the more remote parts of the old country, where they are not so civilized in this respect as we are.

In some of these places witchcraft, in its ancient potency, appears to be considered still to exist; and there is a curious instance of this in the case of *The Queen* v. *Maria Giles*, reported in 13 W. R. 327. The prisoner was indicted for obtaining money under false pretences, under the following circumstances: One Henry Fisher deserted his wife, of which the prisoner was made aware. Desiring to turn an honest penny by this incident in the married life of Mr. and Mrs. Fisher, or perhaps moved by the distress of the wife, and possibly duped by her own folly, the prisoner represented to the wife that she could bring her husband back, "over hedges and ditches," by means of some stuff she had in her possession. It was proved that the wife asked the prisoner to tell her a few words by the cards, to fetch her husband back; that the prisoner asked her how much money she had; that, when she said sixpence, the prisoner said that that would not be enough, whereupon the wife gave her another sixpence; that she said her price was high—it was five shillings; that she asked the wife if she had a clock at home, and if she had anything on that she could leave; that the wife said she had on a petticoat, but it was old; that the prisoner said that it was of no use; that the wife said she had two frocks on, and at the request of the prisoner she left one with her; and that after the prisoner had got the money, she said she *could* bring the husband back, having previously said she *would* bring him back. The jury found a verdict of guilty, but the case was reserved for the opinion of the court.

Chief Justice Erle, in giving judgment, said, that a pretence of power, whether physical, moral or supernatural, made with intent to obtain money, is within the mischief intended to be guarded against by this branch of the law, and that the indictment was good. He also considered that there was sufficient evidence to sustain the conviction. "I take the law to be," said he, "that a pretence, within the statute, must be of a present or past fact and that a promissory pretence that I will do something is not sufficient. The question is, was there a pretence of an existing fact, viz., a pretence before and at the time when the money was obtained, that the prisoner had power to bring back the husband? * * * I think, looking at the whole transaction, that she intended to pretend to the wife that at that time she had power to bring her husband back. I think that there was evidence to go to the jury that the prisoner was a fraudulent impostor, and that she ought to be convicted."

How much more circumspectly would the Davenport Brothers or "Professor" Simmons

have managed matters, and escaped the clutches of the law! But, as we before remarked, this old woman is behind the age.

## COMMON PLEAS REPORTS.

After a fair trial, we think the profession have every reason to be well satisfied with the new series of these Reports, prepared by Mr. Vankoughnet. For our part, our thanks are due to him for his courtesy to us in various ways, in connection with them.

It is gratifying for us to be able to state that the punctuality which has so long distinguished the Reporter of the Queen's Bench, is now equalled by that of his *confrere* of the Common Pleas.

It is certainly a great satisfaction to know that within a very few days after the judgment in a case is delivered, the matter is in the hands of the printer and is soon afterwards laid before the profession.

Those who have ever taken the trouble to prepare a careful report of a case, will readily understand that reporting is not simply copying manuscript and reading proof, whilst all can and do appreciate reports that are correct in themselves, and are issued with promptitude and regularity.

## CHANCERY REPORTS.

We are glad to see that Mr. Grant, the Reporter for the Court of Chancery, has reduced the price of his Reports to four dollars per annum, if paid in advance.

We sincerely hope he will not be a loser by the change, but rather a gainer, in a pecuniary point of view. The profession at all events will appreciate his enterprise, and many who have not hitherto taken these Reports, will avail themselves of the lowness of the price, and become subscribers. This is a move in the right direction, and should be supported.

## ACTS OF LAST SESSION.

*An Act to amend the Act respecting Attorneys.*

Whereas, it is expedient to amend the Act respecting Attorneys in the manner hereinafter mentioned; therefore, Her Majesty, by and with the advice and consent of the Legislative Council and Assembly of Canada, enacts as follows:—

1.—The third subsection of chapter thirty-five, of the Consolidated Statutes for Upper Canada, is hereby repealed, and the following subsection is substituted in lieu thereof:

"Any person who has been duly called to practise at the Bar of Upper Canada or who has been duly called to practise at the Bar of any of Her Majesty's Superior Courts not having merely local jurisdiction in England, Scotland or Ireland, and has been bound by contract in writing to a practising attorney or solicitor in Upper Canada, to serve him as his clerk for three years."

2.—The repeal of the said subsection shall not affect persons coming within its provisions who may be under articles at the time of the passing of this Act.

3.—The first subsection of the third section of the said Statute is hereby repealed, and the following subsection is substituted in lieu thereof:

"He has during the term specified in his contract of service duly served thereunder, and has during the whole of such term been actually employed in the proper practice or business of an attorney or solicitor by the attorney or solicitor to whom he has been bound at the place where such attorney or solicitor has continued to reside during such term (or with his consent) by the professional agent of such attorney or solicitor in Toronto for a part of said term, not exceeding one year."

4.—The second subsection of the third section of the said Statute is hereby repealed, and the following subsection is substituted in lieu thereof:

"2. He has attended the sittings of the Court of Queen's Bench or Common Pleas during at least two of the terms of such courts and has complied with the regulations of the Law Society in that behalf."

5.—The fourth subsection of the third section of the said Statute is hereby repealed, and the following subsection is substituted in lieu thereof:

"4. At least fourteen days next before the first day of the term in which he seeks admission he has left with the Secretary of the Law Society his contract of service, and any assignment thereof and affidavits of the execution of the same respectively, and his own affidavit of due service thereunder, and a certificate of the attorney or solicitor to whom he was bound, or his agent as aforesaid, of such due service, and a certificate of his having attended the sittings of the court or courts during two terms as hereinbefore provided, and (in the case of a person who has been called to the Bar or taken a degree as hereinbefore mentioned) a certificate of his having been so called to the Bar or taken such degree or a duly authenticated certified copy of such certificate."

6.—The fifth section of the said Consolidated Statute is hereby repealed, and the following section is substituted in lieu thereof:

"5.—In case the contract of service, assignment (if any), affidavit and certificate of due service or any of them cannot be produced, then on application to be made to the Law Society by a petition verified by affidavit to be left with the secretary of the society at least fourteen days next before the first day of the term on which the applicant seeks admission, the society on being satisfied of such fact may, in their discretion, dispense with the production of such contract, assignment, affidavits and certificate of due service or any of them, and may, notwithstanding such non production, grant the certificates provided for in the tenth section of this Act."

7.—The Law Society may—upon being satisfied that the applicant for admission has really and *bona fide* served and been actually employed in the manner in the said amended Act and in this Act specified, under articles for the term of five years, or shorter term required by this or the said amended Act, as the case may be, in their discretion and in accordance with rules to be established by them, with the approbation of the visitors—grant the certificates provided for by the tenth section of the said amended Act, although the terms or conditions by this or the said amended Act required, have not been strictly complied with.

8.—The eleventh section of the said statute is hereby repealed, and the following section is substituted in lieu thereof:

"11. Whenever any person has been bound by contract in writing to serve as a clerk to an attorney or solicitor, such contract with the affidavit of execution thereof annexed thereto, shall, within three months next after the execution of the contract, be filed with one of the Clerks of the Crown and Pleas at Toronto, who shall endorse and sign upon such contract and affidavit a memorandum of the day of filing thereof, and every assignment of such contract, together with an affidavit of the execution thereof annexed thereto shall be filed in like manner within the like period of three months next after the execution thereof"

9.—The twelfth section of the said Statute is hereby repealed, and the following section is substituted in lieu thereof:

"12. In case such contract of assignment (as the case may be) with the affidavit of execution annexed thereto be not filed within three months after the date of the contract or assignment, the same may nevertheless be filed with either of the officers before mentioned, but the service of the clerk shall be reckoned only from the date of such filing, unless the Law Society in its discretion shall for special reasons in any particular case otherwise order."

*An Act to amend the Consolidated Statute respecting the Court of Chancery.*

Her Majesty, by and with the advice and consent of the Legislative Council and Assembly of Canada, enacts as follows:

1.—The Court of Chancery in Upper Canada shall have the same jurisdiction as the Court of Chancery in England has, in regard to leases and sales of settled estates, and in regard to enabling minors, with the approbation of the Court, to make binding settlements of their real and personal estate on marriage; and in regard to questions submitted for the opinion of the Court in the form of special cases on the part of such persons, as may by themselves, their committees or guardians, or otherwise concur therein.

2.—The Court shall have the same equitable jurisdiction in matters of revenue as the Court of Exchequer in England possesses.

3.—In all cases in which the Court has jurisdiction to entertain an application for an injunction against a breach of any covenant, contract or agreement or against the commission or continuance of any wrongful act, or for the specific performance of any covenant, contract or agreement, the Court, if it thinks fit, may award damages to the party injured either in addition to or in substitution for such injunction or specific performance, and such damages may be ascertained in such manner as the court may direct, or the Court may grant such other relief as it may deem just.

4. An Order or Decree for Alimony may be registered in any Registry Office in Upper Canada, and such Registration shall, so long as the Order or Decree registered remains in force, bind the estate and interest of every description which the defendant has in any lands in the County or Counties where such Registration is made, and operate thereon for the amount or amounts by such Order or Decree ordered to be paid in the same manner and with the same effect as the Registration of a charge of a life annuity, created by the defendant on his lands would; and such Registration may be effected through a certificate by the Registrar of the Court of such Order or Decree.

5.—Where a commission of lunacy would have been heretofore necessary or proper, the Court in lieu thereof may, with or without the aid of a Jury (which the Court or a Judge thereof may cause to be empanelled as in other cases) hear evidence and enquire into and determine upon the alleged lunacy, provided that the alleged lunatic shall have a right in such cases to demand that the inquiry be submitted to a jury, or the Court may order that the inquiry be had before any Court of Record, and every such inquiry, whether under a commission of lunacy, or before any such Court of Record, shall be confined to the question, whether or not the person who is

the subject of the inquiry, is at the time of such inquiry of unsound mind and incapable of managing himself or his affairs, and the verdict rendered by a Jury shall in every case be returned unto the Court, certified by the Judge before whom the inquiry has been had, and shall be final as to the question on such inquiry unless the same be set aside.

6.—Where any such inquiry is had by the Court, with or without the aid of a Jury or before a Court of Record, no traverse shall be allowed, but the Court, if dissatisfied with the finding of a jury, may, at the instance of any party who would be entitled to traverse an inquisition under commission of lunacy, direct a new trial or new trials from time to time upon application therefor made to the Court within three months from the time the verdict is rendered, or such further time as the Court, under special circumstances, may permit, and subject to such directions and upon such conditions as to the Court may seem proper, and the Court may order any such new trial to be had before the same court in which the verdict was rendered or before any other Court.

7.—On every such inquiry, the alleged lunatic, if he be within the jurisdiction of the Court, shall be produced and shall be examined at such times and in such manner either in open Court or privately, before the Jury shall retire to consult about their verdict, as the presiding Judge may direct, unless the Court ordering such inquiry shall beforehand by order have dispensed with such examination.

8.—Any order by a single Judge in a matter of lunacy, shall be subject to rehearing before the full Court, and any order of the full Court shall be subject to an appeal to the Court of Error and Appeal respectively within the same times and under the same conditions as in other cases in the said Court of Chancery, unless the said Court or a Judge thereof, shall otherwise order.

9.—The Court may order the costs, charges and expenses of and incidental to the presentation of any petition for a commission of lunacy or any inquiry, inquisition, issue, traverse, or other proceeding in lunacy, to be paid either by the party or parties presenting such petition or prosecuting the same or such inquiry or other proceeding in lunacy, or by the party or parties opposing the same, or out of the estate of the alleged lunatic, or partly in one way and partly in another.

10.—The seventy-third section of the said Act is amended by inserting therein immediately after the words "*sui juris*" the words "*or non compotes mentis.*"

11.—The Court shall have the same powers of regulating the practice in matters of lunacy and in all matters under this Act as in other cases within the jurisdiction of the Court.

12.—Where a defendant or respondent in any suit or matter is absent from the Province or cannot be found therein to be served, the Court may authorize proceedings to be taken against him according to the practice of the Court in the case of a defendant, whose residence is unknown, or in any other manner that may be provided or ordered, if the Court shall, under the circumstances of the case, deem such mode of proceeding conducive to the ends of justice.

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*An Act to amend and extend the provisions of chapter thirty of the Consolidated Statutes for Upper Canada, intituled: "An Act respecting Interpleading."*

Her Majesty, by and with the advice and consent of the Legislative Council and Assembly of Canada, enacts as follows:

1.—The eighth section of chapter thirty of the Consolidated Statutes for Upper Canada is hereby repealed.

2.—The following section is substituted for and shall be read in lieu of the said eighth section hereby repealed:

"In case any claim be made to any goods or chattels, or to any interest in any goods or chattels, taken or intended to be taken under an attachment against an absconding debtor, or under any proceedings under 'The Insolvent Act of 1864,' or in execution under any process issued by or under the authority of any of the said Courts, or to the proceeds or value thereof, or to the proceeds or value of any lands or tenements taken and sold under any such process, by any person, not being the person against whom such attachment or proceeding or execution issued, or by any landlord for rent, or by any second or subsequent judgment or execution creditor claiming priority over any previous judgment or execution process or proceeding, then and in every such case, upon the application of the Sheriff (or other officer) to whom the writ is directed, made to the Court from which such writ or proceeding issued, or to any Judge having jurisdiction in the case, and either before or after the return of such process, or before or after any action has been brought against such Sheriff or other officer, such Court or Judge may, by rule or order, call before such Court or Judge as well the party who issued such process as the party making such claim, and may thereupon exercise for the adjustment of such claim and the relief and protection of the Sheriff or other officer, all or any of the powers and authorities hereinbefore contained, and in case the claimant shall abandon his claim, may order him to pay the Sheriff's costs of the application and may further require either or both of the parties to give security for the costs of the Sheriff or other officer, relating to such proceedings, and may order the money which forms the subject of the claim to be paid into Court by the Sheriff to await the result of the interpleader issue, and may make

such other rules and orders as appear just according to the circumstances of the case."

3.—The repeal of the said eighth section of the said Act shall not affect any cause, matter or proceeding now pending in any Court of Law or Equity in Upper Canada, but the same may be continued under the said "Act respecting Interpleading" as amended by this Act.

4.—This Act shall apply to Upper Canada only.

## SELECTIONS.

### LAW REPORTING—No. 2.

(*Continued from* 10 *U. C. L. J., p.* 317.)

In a former number we stated that the reports of those reporters whom we cited as examples of good reporting usually had three divisions. 1st. The case or statement of facts. 2nd. Argument of counsel on these facts. 3d. The *opinion* of the Court on what preceded; each of the parts being separate and *pure;* the statement or "case," pure fact; the argument of counsel, argument merely; the opinion, opinion simply, with the grounds assigned therefor.

Now wherein do the American reports, especially the reports of later times continually differ from these models? They differ from them in this respect chiefly, to wit: that the "statement" does not present facts at all, and that the opinions do present them largely. And the order of results has been, I think, this:

1st. That the arguments of counsel were unintelligible.

2d. That they have been suppressed.

3d. That "opinion" has become the whole "report;" a report generally not a good one and often positively bad: its value as "report" diminishing in exact ratio of its perfection as "opinion."

4th. That the law, so far as it is *a science of precedents* is becoming radically disturbed, and that instead of resting,—like that system of our English ancestors adopted by our American fathers of 1776 as their own—on known adjudications—adjudications which were respected ostensibly because they were solemn judgments—we are in danger of drifting into another system—a system more like that of Continental Europe—where jurisprudence shall be without soundings or chart, and without even a compass other than what this body of men or that may think good on principles of general equity; a system bad enough even when integrity characterizes its administrators; but woful if integrity should cease ever to be their portion.

This last proposition is a long one, and perhaps alarming. I think I shall show it to be true, if my reader will follow me through.

[I do not here think it worth while to refer at large to another class of reports—characterized by exactly opposite qualities, so far as respects the reporter's work—a class represented in perfection by those of Pennsylvania some years ago. These have a statement with a witness: for the reporters used to cast in as their "case," the paper book complete; testimony as taken at large upon the judge's notes; deeds, wills, &c., *in extenso*, with seals, signatures, acknowledgments, and all; the whole record in short as it came up. This disorderly congeries being nearly as unintelligible as no statement at all, the result was much as though none had been made in fact; as we may still include such reports within the class I treat of; that is to say the class where the reporter does *not* state the case and leaves the facts to be gathered from the opinion only.]

The following presents the form of report which I speak of as now common in several States of the Union, and is one of the better illustrations of what I deem a bad form: I do not mean to speak of the form as *universally* prevalent in America. It does not prevail in Massachusetts, nor in Rhode Island, nor in Connecticut, nor in Vermont, nor in New Hampshire, nor much, I think in New York:—I mean does not prevail in their Supreme Court Reports. Nor did it prevail in Virginia so long as she gave us reports at all. There are probably other States where it may not have place. At the same time it is a common form in our country, especially in the West, though it is not confined at all to the courts of that great and increasing part of our nation.(*a*) To revert however to our report. Here it is:

#### Smith v. Jones.

Executors to whom a power is given by will to sell land but who have all renounced the executorship, yet have power to execute a valid deed of the land; and this although they have not only renounced, but have agreed and assisted in the appointment of other persons as administrators *cum testamento annexo*, who are still alive.

This was a writ of error to Jackson county, the suit below having been ejectment to recover

(*a*) The reader seeking illustrations of the style, will find them in such cases as these. *Thomas* v. *Bowman*, 30 Illinois, 83; *Thompson* v. *Board of Trustees*, id. 99; *Hacreth* v. *Franklin Mill Co.* id. 151; *People* v. *Auditor*, id. 434, or in *Spining* v. *Blackburne*, 13, Ohio State, 131; *Dudley* v. *Geauga Iron Works*, id. 169; *Plumb* v. *Robinson*, id. 299; *Fort Clinton Co.* v. *Cleveland Co.* id. 545; *Ish* v. *Crane*, id. 575; or in *Thornrard* v. *Carlisle*, 1 Patton & Heath, 13; or in *Stewart* v. *Rogers*, 1 Maryland, 99; *Haight* v. *Burr*, id. 131; *Weems* v. *Weems*, id. 336; *Stickney* v. *Gyaff*, id. 491; or in *Way* v. *Lamb*, 15 Iowa, 81; *Stuck* v. *Reese*, ip. 122; *Hunt* v. *Daniels*. id. 146; *Harper* v. *Drake*, id. 157; *Hershes & Huber* v. *Hershes*, id. 185; *Humphrey* v. *Darlington*, id. 207; or in *Spear* v. *Whitfield*, 2 Stockton's Chancery, 108; *Clapp* v. *Ely*, id. 179; *Holmes* v. *Stout*, 419, *&c.*

Some of the reports begin without the *least statement* whatever of the case, thus:

"*Points and authorities of appellant.*

See in illustration of this style, *Sweers* v. *Duke*, 8 Minnesota, 23, *Bael* v. *Bassen*, 26, *Finney* v. *Callendar*, 41; *Rutherford* v. *Newman*, 47; and in fact *per totum librum*. In Stockton's Chancery Reports and in those of Beasely (both of New Jersey) there is frequently no statement at all; the reporters acting as mere *editors* of the opinions. This is particularly true of Mr. Beasely's.

I particularize the different volumes above mentioned, because they come first to my hand. But they represent a large class of reports throughout the country.

a tract of land. *The facts are stated in the opinion of the Court.* [They would *properly* appear here.]

*Green* for the plaintiff in error. We agree, that executors, vested *nominatim*, with power to sell, may renounce the executorship, and yet execute the trust of *selling the estate*. But the case is different where the power is given to them *as executors*, which is the case in this will. Here, it will be observed, that not only had the executors renounced, but by their instance and act, three other persons had been appointed administrators with the will annexed. Their renuciation had thus been accepted in the most complete and effective way; they had renounced: their renunciation had been accepted: the place had been vacated, and being vacant, was now filled by new occupants. Admitting that a sinple renunciation filled in the office or delivered to the register, would be insufficient to destroy the validity of a deed made by the original executors, *no one having as yet displaced them*, the case is widely different when other persons are *in* the place. Then surely *they* must be out of it. Bacon, in his Abridgment,* says: "If an executor refuse before the ordinary, the ordinary may grant administration *cum testamento* to another person, and he can never be permitted to prove the will." In *Yates* v. *Crompton*,† an administrator *d. b. n.* filled a bill against the heir to sell, the executor having renounced. It was objected that the executor ought to have been made a party. But the sale was decreed.

*Brown, contra:* By well settled principles of common law, the executors had just as full power to exercise their power of sale after their renunciation as before it. The renunciation to the register or ordinary relates simply to personality; the only sort of estate over which either have any power whatever. The power to sell is given by the *will*, and might be exercised without any probate of it at all; *Yates* v. *Crompton*, cited on the other side, is in our favor. The objection was that "the executors ought to have been made parties, for notwithstanding they had renounced, yet the power of sale continued in them." The objection was overruled, "there being *only* a power and no ESTATE divided." So too what Bacon says is true only by the civil law, but whether or not, it has no application here, for the executor don't ask to resume. Swinburne on Wills ‡ says, "If a man devises that A. B. and C. D., whom he makes his executors, shall sell his lands, and they refuse to be his executors, yet nevertheless they may sell because they are *named* by their proper names." For this he cites Fulbecke, an old but good writer. Here the power was to his executors hereafter to be *named*, and three particular persons afterwards are "named." Indeed the authorities go much further. Viner§ says, one wills that his executors may alien his land *without* naming them. The executors named refused to be executors; yet they may alien. This law is not only well settled now, but it has been settled from a very ancient date. It was expressly so decided by all the judges of England in Trinity Term, in the 16th year of Henry the VII., and is reported in the Year Book of that reign. The udges who gave opinions were Fineux, Chief Justice, and Reid, Tremaille, and Frowick, Justices.

This case is thus translated by Mr. Sugden in his work on Powers, *Appendix*.

"It was lately adjudged in the Exchequer Chamber, by all the Justices of England, that if a man makes a will of lands, that his executors shall sell the land and alien, &c., if the executor renounce administration and to be executors, there neither the administrators nor the ordinary can sell or alien, (*quod nota*); which was allowed by Rede and Tremaille for good law.

"And if a man makes his will that his executors shall alien his land without naming their proper names, if they refuse the administration and to be executors, yet they may alien the land, which was admitted by Fineux, C. J., and Tremaille, J., for *clear* law; Rede, J., not denying it.

"And if a man makes his will that his land which his *feoffees* have, shall be sold and aliened, and does not say by whom, there his executors shall alien that, and not the feoffees, per Rede, Tremaille and Frowick, J. J., Fineux, C. J., said nothing to this this day, but the day before he in a manner affirmed this. Conisby, J., said that the feoffees shall alien; but this [fact] was denied, for executors have much greater confidence in them than feoffees have."

Here is our point, fully, clearly and precisely stated, between three and four hundred years ago, as being "clear law" in that day. It was reported at once; printed soon after with the invention of printing, and has stood and been cited from that time to this, as an authoritative decision. Sugden, for example, says:‖ "It remains only to be observed that where the power is given to executors they may exercise it, although they may renounce probate of the will." And Preston:¶ "Athough executors renounce the probate of the will as to personal estate; they are not by such renounciation disqualified to execute an authority of sale over real estate." The American author, Mr. Hood,* says: "At common law, executors who have formally renounced the administration of a will, may nevertheless execute a power given by will to sell lands."

The opinion of the court was delivered by TOMPKINS, C. J.

Courtney, who had originally owned the land, made his last will and testament on the 11th August, 1835, by which he directed and empowered his executors thereinafter to be named, to sell, convey and make over any part of his real estate, and he appointed two friends of his, Campbell and Roberts, his executors. He died in 1840. The executors, by instrument of renunciation filled with the surrogate and in his office, declined the executorship, and at their suggestion and desire two other persons, White and Green, were appointed administrators, with the will annexed. In 1850, however, the original

* Vol. 2, p. 405, Tit. Executors and Administrators, 9.

† 2 Peere Williams, 206.

‡ Vol. 2 p. 731, ed. of 1803.

§ Vol. 8 p. 466, pl. 9.

‖ Powers, vol. 1, p. 139. (15 and 16 Law Library.)

¶ Abstracts of Title, vol. 2, p. 262.

* Treat. on Executors, p 243.

executors, Campbell and Roberts sold the land, making a deed in which, reciting the will and their own appointment as executors, they granted and conveyed it to the defendant, Jones. The question was whether after this renunciation they had power to sell the estate: a point which the court below ruled affirmatively and which same point was now here on error.

The question raised in this case is not without some difficulty, and it is perhaps remarkable that no American decision has been discovered in which the point has been brought up. It is however a general rule that the probate has to do with the personalty only; for it is over the personalty only that the surrogate's power extends. A renunciation of the executorship filed with the surrogate is at most but a renunciation of the executorship of the personalty. It may apply to matters within his jurisdiction, but not to matters outside of it. Hence the executors in this case, although they renounced the administration, might, without inconsistency, execute the trust respecting the land. Independently of Viner and Swinburne,† we have the case which the research of counsel has furnished us from the Year Book of Henry VII. I have examined the Year Book, and the citation is correct. Upon the strength of these authorities, as well as general principles the court is of opinion that the executors had power to sell, after they had renounced the administration of the personal estate.

Judgment affirmed.

Now here, it is obvious is a different disposition of things from that which I have spoken of as common in Burrow, Durnford & East, and other good reporters. The reporter states no facts. The judge states them all. What is the result? The first result is that the arguments of counsel, apparently characterized by learning are—as given in the place where they *are* given—unintelligible simply. They are not upon a preceding or presupposed case, but are upon a case to be stated and to be understood hereafter; a case in the *paulo-post-futurum*. The arguments are therefore largely or wholly "in the air." To understand, the reader must, first of all, *skip* them: and passing to the opinion get from *it* the facts. Well—he passes to the opinion and reads it until he sees that he has finished reading the *facts* which it presents. Being now, for the first time, in a state to understand the argument previously skipped, he turns back to read *it*. Having read it, he turns forward again, and skipping the facts which he has read, passes over to the spot where the opinion proper begins.

Any man having a good sense of order would say, I should suppose, that it would have been better if the *reporter* had put things in his book, into that shape, which in spite of the book, the reader is compelled to put them in his mind. We should thus have had facts or "case" first; argument of counsel next, and opinion separate from case and after arguments—in other words, opinion proper—last: and the reader would have read in a sequent order without this operation of the "Forward and back," "Forward, cross over," that exactly which he reads only after the whole movement is performed. * * * *

The difference is that in the form we suggest the "case" is put before the argument, and as the entire *statement*, while in the one copied it appears after the argument and as a part of the *opinion*. Can any man doubt which is the right form?

But the report as given, though in a bad form, is not a report calculated to reveal the full defects of the school of reporting to which it belongs. The suit involved but a single question. The facts were few and simple. They are stated by the judge in the opening of his opinion; and they are stated fully, in a clear, terse, consecutive form; and a form strictly narrative. The printer's aid comes in to help the effort; and a new paragraph shows where the "case" has ended and where the opinion proper now begins. In such an instance the style of the report imposes no great inconvenience on the reader. He has only to skip arguments and go forward, read facts and go backward, read arguments and go forward again, skip facts and read opinion pure—and be done. We shall give a more complicated form of the case in a future number, where the defects of the bad style of which we speak will be more patent, and we shall also afterwards pull it into proper shape as we have done the one given in this number.

But the difficulty is that in many cases while the reporter speaks the truth when he says that "facts are stated in the opinion of the court," he speaks it to a common intent only; whereas in referring his readers any where for "the case"—that case which is the foundation of everything—he should speak it to a certain intent in every particular. I have looked at many cases in American reports, in which the reporter thus refers his readers. And while indeed we find facts, we find frequently that they are either

1. Stated imperfectly, that is to say, not stated fully, *or*

2. Not stated consecutively, and all in one place, to wit, the beginning of the opinion, *or*

3. Not stated in the narrative as distinguished from the argumentative form.

In other words, facts are stated to that extent, and in that way, and with that form in which a judge may to some degree properly state them; that is to say, they are stated by way of inducement and to show the grounds and reasons of the opinion, but are not stated to that extent and in that way and with that form in which a reporter should state them when he seeks to put his case before his reader, as the base of argument, opinion and sentence alike. The statement indeed is neither *totus, teres, nesque rotundus*. — *Legal Intelligencer.*

† See Swinburne, 408; 8 Viner, 466, P. 3.

# UPPER CANADA REPORTS.

## QUEEN'S BENCH.

(*Reported by* Chris. Robinson Esq., Q.C., *Reporter to the Court.*)

### Edgar v. Newell.

*Slander—Evidence of character—Justification—New trial.*

In an action for slander imputing theft, defendant having pleaded and endeavoured to support pleas of justification, *Held*, that evidence of the plaintiff's general bad character for honesty was properly rejected.

*Semble*, per *Hagarty J.* that it would have been inadmissible even without the justification; but that, if not guilty only be pleaded, defendant may shew, solely in mitigation of damages and to rebut the presumption of malice, that before speaking the words it was a common rumour in the neighbourhood that defendant had been guilty of the specific offence charged.

The evidence in support of one of the pleas of justification was very strong, sufficient to have warranted a conviction, if the plaintiff had been on his trial. The charge however was made three years after the alleged offence, for which there had been no prosecution, and defendant had no special interest in the matter. The jury having found for the plaintiff, and $150 damages, the court refused to interfere.

[Q. B., H. T., 1865.]

Slander, the words charged being "Edgar is a thief, and I can prove it." *Pleas*, 1. Not guilty. 2 and 3, Justification. The second plea alleged that the plaintiff before the said time when, &c., to wit on, &c., feloniously did steal, take, and carry away certain goods and chattels, to wit, one over-coat, two horse-blankets, and one bag containing empty bags, of one William Snider. The third plea charged the plaintiff with stealing a barrel of salt of one J. P. O'Higgins.

The case was tried at Stratford, before *Draper* C. J. The words were proved, and defendant gave very strong evidence to shew that the theft charged in the second plea had been committed by the plaintiff about three years previously. He attempted to make out the charge alleged in the third plea as well, but the proof offered was insufficient, and was not pressed before the jury. He also tendered evidence that the plaintiff's character for honesty and his general reputation in that respect was bad, which the learned Chief Justice rejected, on the ground that there was a plea of justification on the record.

The jury found for the plaintiff, $150 damages.

*Christopher Robinson*, Q.C., obtained a rule *nisi* for a new trial, on the ground that the justification pleaded in the second plea was clearly proved; or on the ground that the learned Chief Justice improperly rejected evidence tendered by the defendant of the plaintiff's general reputation for dishonesty, and bad character as regards that particular trait or quality.

*Robert Smith* shewed cause. He contended that the plaintiff having been in effect placed upon his trial on a charge of felony, it would be contrary to the established practice in such cases to interfere with the finding of the jury in his favour, even though it might seem to be against the weight of evidence—*Symons* v. *Blake*, 2 C. M. & R. 416: that the defendant having failed to prove his second plea of justification, the verdict on that issue was clearly right, and a new trial, which would disturb it, should not be granted—*Baxter* v. *Nurse*, 6 M. & G 935: that the jury might have been properly influenced in their view of the whole case by the fact of such plea having been pleaded without sufficient ground; and that the evidence as to character was properly rejected—*Jones* v. *Stevens*, 11 Price 235; *Thompson* v. *Nye*, 16 Q. B. 175.

*Robinson*, Q C., in support of the rule, cited, as to the motion for new trial on the evidence, *Mellin* v. *Taylor*, 3 Bing. N. C. 109; *Regina* v. *Johnson*, 1 L. T. N. S. 518, Q. B.; *Peters* v. *Wallace*, 5 U. C. C. P. 288; *Swan* v. *Cleland*, 13 U. C. Q. B. 385: As to the admissibility of the evidence of character, *Richards* v. *Richards*, 2 Moo. & Rob. 557; *Knobell* v. *Fuller*, Pea. Add. Cas. 139; *Earl of Leicester* v. *Walter*, 2. Camp. 251; *Inman* v. *Foster*, 8 Wend. 602; *Bell* v. *Parke*, 11 Ir. C L. Rep. 424; ——— v. *Moor*, 1 M. & S. 284; *Bennett* v. *Hyde*, 6 Conn. 24; *Bracegirdle* v. *Bailey*, 1. F. & F. 535; *Myers* v. *Currie*, 22 U. C. Q. B. 470; *Jones* v. *Stevens*, 11 Price, 235; *Foot* v. *Tracy*, 1 Johns. 46; *Wyatt* v. *Gore*, Holt N. P. C. 299; *Newsam* v. *Carr*, 2 Stark. N. P. C. 70; *Douglass* v. *Tousey*, 2 Wend. 352; *Wolcott* v. *Hall*, 6 Mass. 514; *Ross* v. *Lapham*, 14 Mass. 275; *Sawyer* v. *Eifert*, 2 Nott. & McCord 511; *Root* v. *King*, 7 Cowen 613; Taylor on Evidence, 4th Ed., 855-6; Rosc. N. P. 576; Add. on Torts 730. As to the effect of a justification being pleaded, Starkie Ev., 3rd Ed., vol ii, 306 note *k*, 641-2; *Cornwall* v. *Richardson*, R. & M. 305; *Snowden* v. *Smith*, 1 M. & S. 286, note *a*; *Root* v. *King*, 7 Cowen, 613.

Hagarty, J., delivered the judgment of the court.

As to the merits. This is one of the many cases in which the court is asked to set aside a verdict of which it cannot approve on a calm consideration of the evidence. The testimony certainly was very strong. It would have sufficed most likely to convict the plaintiff, had he ever been put upon his trial for the offence; and had any right, estate or franchise, or large sum of money been at stake, we think it would be only right to submit the case to another jury. But we hardly see our way to interfere in a case like the present. The charge was made long after the alleged offence had been committed. No person had thought proper to prosecute the plaintiff for it, and the defendant, having no especial interest in the matter, charges the plaintiff generally with being a thief. He does this at his peril, and when sued for damages tries to prove the charge, and fails to convince the jury.

It does not follow, because a man has once committed an offence, that a jury will always regard with favour a person who persists in casting it up against him at any period, however remote. A person may make the charge relying on his being able to prove it to the satisfaction of a jury. We think he must always run this risk. But we do not think a court is bound to set aside, as a matter of right, a verdict rendered against the weight of evidence, but may leave the defendant to the consequence of his own rashness. It is not usual to put a plaintiff, deliberately charged with fraud or felony in a civil action, twice, as it were, upon his trial; at all events, an action for slander is not one in which the ordinary wholesome rule should be set aside.

We think we cannot properly interfere on the merits.

The rejection of the evidence tendered as to character opens a wide field for discussion.

1. Should it be permitted under any circumstances?

2. If admissible in mitigation of damages, can it be received after evidence offered in bar on a plea of justification?

It seems to me that the doubt suggested as to this evidence, is felt more by the text writers than the judges.

Mr. Taylor, in his last edition, page 855, after giving the different views, says, "Such being the arguments on either side of this vexed question, it remains only to observe that the weight of authority inclines slightly in favour of the admissibility of the evidence, even though the defendant has pleaded truth as a justification and has failed in establishing his plea."

He cites a great number of cases. I have examined them. The American authorities certainly support his view. I doubt if the English cases go so far. Most of the cases are *nisi prius* decisions. I am not aware of any express decision of the court in Banc except *Jones* v. *Stevens*, 11 Price, 235, which is directly against its reception.

In *Thompson* v. *Nye*, 16 Q. B. 175, the question rejected was whether the witness had not heard from other persons that the plaintiff was addicted to certain practices, the subject of the slander. The court refused to decide the general point, but held the question rightly rejected, as it should have been confined to rumours existing before the utterance of the slander. Patterson and Wightman, J. J., say they give no opinion on the general question. Coleridge, J., says, "I will only go so far as to say, that I do not wish it to be supposed that I am in favor of allowing the question to be put even in its most limited form. My present impression is against doing so." Erle, J., says, "It is not necessary to give any opinion as to the admissibility of the question in a qualified form. Many learned judges have admitted it, but they all acted on a decision at *Nisi Prius* (*Earl of Leicester* v. *Walter*), which it was not worth the plaintiff's while to question. But in *Jones* v. *Stevens* the point was brought before the full Court of Exchequer; and there the question was held inadmissible in its general form."

No doubt, *Earl of Leicester* v. *Walter*, 2 Camp. 251, is the chief authority. It was a decision of Sir James Mansfield, and as the plaintiff had a verdict he did not of course, move. In deciding to admit the evidence, Sir James says: "In point of reasoning, I never could answer to my own satisfaction the argument urged by my brother Best" (the objecting counsel) "at the same time, as it seems to have been decided in several cases that, if you do not justify, you may give in evidence anything to mitigate the damages, though not to prove the crime which is charged in the libel, I do not know how to reject these witnesses. Besides, the plaintiff's declaration says, that he had always possessed a good character in society, from which he had been driven by the insinuations in the libel. Now the question for the jury is, whether the plaintiff actually suffered this *gravamen* or not. Evidence to prove that his character was in as bad a situation before as after the libel, must therefore be admitted.

In a case in Ireland, in 1860, *Bell* v. *Parke* (11 Ir. C. L. Rep. 326,) Pigot, C. B., is decidedly of opinion, "that the great preponderance of authority is in favor of reception of the evidence." He cites the passage from Starkie on Slander, (vol. ii, page 88,) relied on by Mr. Robinson in his very able and exhaustive argument on the authorities. Fitzgerald, B., treats it as an unsettled question, Hughes, B. concurring with him. In the last edition of Starkie on Evidence, the point is not touched upon.

In *Bracegirdle* v. *Bailey*, 1 F. & F. 536,—in slander, and not guilty alone pleaded—Byles, J., after consulting Willes, J., held, "that no evidence of bad character, or questions relating to the plaintiff's previous life or habits, tending to discredit him, and to mitigate damages, were admissible, either on cross-examination or examination in chief, and that he could not ask any thing to prove the libel true."

In this court, in *Myers* v. *Currie*, 22 U. C. R. 470, (slander imputing theft), a motion was made for a new trial, because Richards, C. J., rejected evidence of the plaintiff's general bad character previous to the speaking of the words. After consulting the judges of the Common Pleas, the judges of this court refused a rule, for the reasons given in the report.

In this state of the law we think we should discharge the rule for rejection of evidence, and leave the defendant, if he think proper, to endeavour to have the law finally settled by a court of Error.

If it be necessary to decide the point, I should say that I think the fact of defendant pleading specifically the truth of his words and endeavouring to prove them, as a matter of reason, if not of clear authority, should operate to the exclusion of evidence of rumours or of general bad character.

Where a defendant pleads only not guilty, and endeavours to shew that he was not actuated by any malice or actual desire to injure defendant, he stands, in my judgment, in a very different position from one who deliberately places a justification on the record. This at once takes away from his conduct that palliation which he can naturally urge on not guilty.

I am inclined to hold, notwithstanding the doubts expressed in *Thompson* v. *Nye*, that with only not guilty pleaded, a defendant might be allowed to shew, solely in mitigation of damages and to rebut the presumption of malice, that prior to his utterance of a specific charge, it was a common talk or rumour in the neighbourhood that the plaintiff had been generally spoken of as having done the thing charged.

This would tend to shew that defendant may have acted not from malice, but rather from heedlessness. If, on the other hand, he put a justification on record, he deliberately charges the plaintiff with the crime as a fact, and I think he should not be permitted to resort to what could only be a palliation and indication of the absence of malice. The justification suggests a wholly different idea of defendant's conduct, and is always held to aggravate it.

General evidence of the plaintiff's bad character for honesty, &c., seems to me to open a far wider

field of enquiry, and should not, I think, be received with or without a justification pleaded. A plaintiff, as has been often said, cannot be expected to be prepared to vindicate every act of his life. The existence of a common fame and rumours that he had done a particular act is a fact, not a mere opinion, and when shewn to be current prior to defendant's utterance of the slander, and wholly unconnected therewith, might, I think, be receivable strictly in mitigation of damages.

The state of the authorities on both points is most unsatisfactory.

We think the rule for a new trial should be discharged.

Rule discharged.

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Campbell v. Patrick Delihanty and William Delihanty, John Toomy, and Margaret his Wife.

*Alias Fi. Fa. lands—When sale may take place under.*

*Held*, conforming to previous decisions in this court—*Nickall* v. *Crawford*, Tay. Rep. 376, and *Ruttan* v. *Levisconte*, 16 U. C. Q. B. 500—that where *fi. fa.* against lands had been in the sheriff's hands for twelve months, and returned, nothing having been done upon it, the sheriff might sell under an alias writ issued thereon without waiting for a year from its receipt.

[Q. B., H. T., 1865.]

Ejectment for the east half of the east half of lot one, in the second concession of Chatham. Defence by Patrick Delihanty for the whole.

The claimant gave notice of title under a sheriff's deed from John Mercer, Esquire, sheriff of the county of Kent, to the plaintiff, of all the interest of Patrick Delihanty in the premises. The defendant claimed title as yearly tenant of John Toomy and Margaret Toomy, who were grantees of William Delihanty of the same.

The case was tried at Chatham, in October, 1864, before Hagarty, J.

The plaintiff put in an exemplification of a judgment recovered in the County Court of York and Peel, in a cause of John Cameron against Patrick Delihanty, entered on the 16th of March, 1857, upon promises, for £51 7s. 10d. damages, and £3 0s. 7d. costs; also of a *fi. fa.* against goods in the same cause, issued on the 7th of September, 1860, returned £25 made, and *nulla bona* for the residue; also of a *fi. fa.* for the residue against lands, tested 13th February, 1861.

He also put in an *alias fi. fa.* for the residue against lands and tenements, tested 15th February, 1862, and received by the sheriff on the 20th of the same month. All these writs of execution were directed to the sheriff of Kent.

It was admitted that a patent granting this land was issued in 1828: that the foregoing judgment was duly recovered, and a certificate thereof was registered on the 26th of March, 1857, and was re-registered.

By deed dated 5th July, 1861, John Mercer, Esquire, sheriff of Kent (under the said *alias fi. fa.* for residue), in consideration of $198.96 paid by the plaintiff, conveyed to him the premises in question, and all the estate, right, title and interest which the now defendant Patrick Delihanty had therein on the 20th of February, 1860—*habendum* to the plaintiff in fee.

The sheriff proved the execution of this deed: that he received the first execution against lands on the 15th of February, 1861, and the second on the 20th of February, 1862. He returned the first of these writs, nothing having been done upon it, and advertised the lands immediately on the receipt of the second writ, and sold on the 5th of July, 1862.

On the defence, it was objected that the writ, on which the lands were sold, was not a year in the sheriff's hands, and on this objection the plaintiff was non-suited, with leave to move to enter a verdict for him if he was entitled to recover.

In Michaelmas Term *Hector Cameron* obtained a rule on the leave reserved, citing *Nickall* v. *Crawford*, Tay. Rep. 376; *Ruttan* v. *Levisconte*, 16 U. C. Q. B. 495.

In this term *Douglas* shewed cause. He relied on the statute 43 Geo. III., ch. 1, re-enacted in the Consol. Stat. of U. C., ch. 22, section 252, "nor shall the sheriff expose the lands to sale within less than twelve months from the day on which the writ is delivered to him."

Draper, C. J., delivered the judgment of the court.

If the question were *res integra*, we should have probably hesitated a good deal before we arrived at the conclusion that where a writ of *fi. fa.* has been placed in the sheriff's hands and remained there for twelve months, during which nothing was done upon it, and then it was returned, "no lands," and an alias writ thereupon issued, that the sheriff could sell lands under the last writ within twelve months from the day on which he received. But such has, within my own experience, been the practice for upwards of thirty years, and on reference to the Master, to search into similar proceedings in his office, he has traced it for nearly forty years back, and probably it is older. In *Nickall* v. *Crawford* Tay. Rep. 376, it was so adjudged, and that case is referred to as authority by Burns, J., in *Ruttan* v. *Levisconte*, 16 U. C. Q B. 495. So many titles would probably be shaken by a contrary decision, that we deem it better to uphold the course so long followed, leaving to a higher authority either to confirm or change it.

Rule absolute.

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## CHAMBERS.

(*Reported by* Robert A. Harrison, Esq., *Barrister-at-Law.*)

### Watson v. Yorston.

*Rescinding order for security for costs—Grounds therefor—Practice.*

Where after an order made for a stay of proceedings till security for costs was given, plaintiff came within the jurisdiction of the court, made affidavit "that he is now residing in Toronto, that when he left Canada he intended to return, his absence from Canada being merely temporary, and that he now intends to remain in Toronto until after judgment has been obtained in this suit by or against him." and undertook not to leave the jurisdiction of the court without leave of the court or a judge or of the defendant, until after the expiration of a reasonable time after the period within which the defendant might properly enter judgment against him, on order was made discharging the order for security for costs.

*Quære*—As to relief in such a case if security for costs were actually given and not merely an order staying proceedings till security given.

[Chambers, December 27, 1864.]

Plaintiff obtained a summons calling on the defendant to shew cause why the order made in this cause on the 16th December, 1864, ordering the plaintiff to give security for costs herein, should not be discharged.

The grounds on which this application was made are those stated in the affidavits filed, which were to the following effect:—The plaintiff himself swore, that before the commencement of this suit he resided for some time in Upper Canada; that about the time of the commencement of this suit he went to New York, and resided there until the 18th December, 1864; that he has now returned to Canada and is now residing in the City of Toronto; that he never intended permanently to reside in New York, but when he left Canada he intended to return, his absence from Canada being nearly temporary; that he now intends to remain in Toronto for some time, and at all events until after the trial and decision of this cause; that the business in which he is engaged may occasion a temporary absence from the Province—since he first came to reside here he had intended to return hither, and whenever for the future such occasional absence may occur he intends to return here; that he intends his residence shall be within this Province, except with such occasional absence, at least until after judgment has been obtained in this suit by him or against him; that he is a natural born subject of Her Majesty, and has never taken the oath of allegiance to the United States Government. The plaintiff's son swore, that about two months ago and for a long time before that, his father and his family resided in Toronto; that about two months ago his father and himself left Canada and went to the United States, where they have since been living, and remained there to the present time, and the remaining parts of his affidavit were to the same effect as the plaintiff's affidavit.

The defendant filed the affidavit of John Hirst, who swore he knew the plaintiff, that he had been for some time past in New York, and the plaintiff and his family have been residing there for a short time; that about two months ago the plaintiff's wife and family, except one son, left New York, and as deponent was informed by those who saw them set sail and as he believes, went to England where he believes the plaintiff's family now is, except the son aforesaid; that the plaintiff is residing with the said son at the Newbigging House in Toronto; that deponent is informed and believes the plaintiff intends almost immediately to leave for England; that the plaintiff's wife told deponent she was going to England; and that when the plaintiff left Toronto he gave up the house in which he was residing, and disposed of his furniture.

*Hodgins*, for the plaintiff, referred to *Hawkins* v. *Paterson*, 9 U. C. L. J. 324; *Durell* v. *Matheson*, 3 Moo. 83; 8 Taunt. 711; *Wells* v. *Barton*, 2 Dowl. P. C. 160; *Kemble* v. *Mills*, 1 M. & G. 565; 8 Dowl. P. C. 836; *Nelson* v. *Ogle*, 2 Taunt. 253; *Blakeney* v. *Dufaur*, 2 DeG. M. & G. 771; 17 Jur. 98; *Crispin* v. *Doglione*, Sw. & Tr. 522; 1 L. T. Rep. N. S. 446.

*McMichael*, for the defendant, cited *Badnall* v. *Haley*, 7 Dowl. P. C. 19; 4 M. & W. 535; *Gill* v. *Hodgson*, 1 U. C. Pr. R. 381; *Oliva* v. *Johnson*, 5 B. & Al. 908.

Adam Wilson, J.—The general rule as to requiring security for costs is to direct security to be given if the plaintiff reside *permanently* abroad or out of the jurisdiction of the court.

There are various exceptions in favour of those in the military or naval service, and of those who have sufficient real estate within the jurisdiction of the court, but these do not apply to the plaintiff.

There are very many decisions on this subject and not all very accordant, but the later ones seem to be more in argreement with each other than the earlier ones.

In *Dowling* v. *Harman*, 6 M. & W. 131, a foreigner who usually resided abroad, but who was in England at the time when the application for security for costs was made, and who swore he intended to remain till after trial, was not ordered to give security for costs.

In *Tambisco* v. *Pacifico*, 7 Exch. 816, *Dowling* v *Harman* was affirmed; Pollock, C.B., said, "The plaintiff (who was a foreigner) states that he came from Greece for the purpose of bringing this action and that he is here now and that he fully intends to remain here until judgment is obtained in it." Alderson, B. said, "It is suggested that he ought to go further and state that he intended to take up his permanent residence here; but such a statement would be of very little avail for he might change his intention the moment judgment had been given—the fact of his being actually resident here is the true criterion by which the question is to be settled."

In *Blakeney* v. *Dufaur*, 2 DeG. M. & G. 771, an absence from May till November in Jersey of an Englishman who was embarrassed, and who could not be readily found while he was in England in consequence of his embarrassment, was held a sufficient absence abroad to be *permanent*, so as to entitle the defendant to security for costs. Lord Cranworth, L.J., said, a party goes to reside abroad within the meaning of the rule, who goes for a purpose which is likely to keep him abroad for such a length of time that there is no reasonable probability that he will be forthcoming when the defendant may have to call upon him to pay costs on the suit.

The case of *Gill* v. *Hodgson*, 1 U. C. Pr. R. 381, cited by the defendant, is no doubt opposed to the case just referred to in the Exchequer. It was decided by Sir J. B. Robinson in Chambers, who held that an Englishman coming from England to this country to remain here only until the suit was decided, was within the rule which required that he should give security for costs.

In *Crispin* v. *Doglione*, 1 Sw. & Tr. 522, Sir C. Cresswell, said, (the plaintiff was a foreigner), "The case in 7 Exch. 816, in which all the former cases comes to this, that when the party is in England and there is no reason to suppose that he is on the point of going away, no order will be made for security for costs, and this seems to be recognized in the Queen's Bench; if he does go abroad you may stop the proceedings till security is given."

In *Thrasher* v. *Busk*, 2 Dowl. N. S. 51, was an application to discharge the rule for security for costs, on the ground that the plaintiff had returned within the jurisdiction of the court and was residing at, &c. Wightman, J., said, "the plaintiffs

attorney's clerk has made the affidavit of the plaintiff's intention to remain in this country, instead of the plaintiff himself. The present rule must be discharged. No doubt it is true that the temporary absence abroad is not a ground for compelling the plaintiff to give security for costs."

In *Place* v. *Campbell*, 6 D. & L. 113, an application was made to rescind an order for security for costs, no security having been given, the plaintiff made affidavit he had returned from abroad and had no intention to leave the jurisdiction. *Per cur.*—"In *Badnall* v. *Haley*, security had been given for costs; but here only an order requiring the plaintiff to give security had been made and no security given. The affidavit of the plaintiff states that he has returned from abroad and does not intend again to quit England. That, we are of opinion, is sufficient; the rule will therefore be absolute."

In *Badnell* v. *Haley*, 7 Dowl. P. C. 19, one of the plaintiffs sureties for costs applied to have the bond delivered up to be cancelled. The affidavit stated that the plaintiff had removed from the Isle of Man in or about the month of January, 1837, and that he had been from that time up to the present time resident in England as a householder at Cotton Hall in Stratford, at which place he was altogether domiciled. Parke, B. said, "I know of no precedent for such an application." Alderson, B. said, "The plaintiff commences an action under such circumstances, that the court impose upon him certain terms. Surely those terms must last while the suit goes on. It is very possible this may be a fraudulent return in order to get rid of the bond." Rule refused.

The present case is, to discharge the order directing a stay of proceedings until security for costs be given by the plaintiff, upon such affidavits as he has now filed, "That he is now residing in Toronto; that when he left Canada he intended to return, his absence from Canada being merely temporary, and that he now intends to remain in Toronto until after judgment has been obtained in this suit by him or against him. No order for security for costs would probably have been made because "the plaintiff said he intends to remain till after judgment, and the fact of the plaintiff being actually resident here, is the true criterion by which the question is to be settled." And perhaps upon the whole facts of the case, the affidavits of both sides, no relief would have been given to the plaintiff if the security had been actually entered into; although I do not understand the effect of any decision to be, that after security has been given, it cannot be ordered to be rescinded upon any case which may be made out for relief by the plaintiff, however strong that case may be. No doubt relief would not be very readily given, because a plaintiff might adapt his movements so as to have the security set aside and then harass the defendant in the meantime with vexatious proceedings, then leave the country and oblige the defendant again to apply for protection for his costs; and this process the plaintiff might repeat to the annoyance of the defendant; every time pushing on his case a little further, till he had accomplished his purpose of finishing his suit without security to the defendant and with perfect immunity to himself. Such a scheme will always be guarded and provided against when anything of the kind is feared; and under any circumstances the court or a judge will act very circumspectly before they afford relief to a plaintiff in such case, while such relief can only be granted by depriving the defendant of a security which he is already possessed of. But this is not the case here. Security has not been given by this plaintiff to the defendant. If the plaintiff had stated in his affidavit, "That he did not intend again to quit Upper Canada," that would have been sufficient ground according to the case of *Place* v. *Campbell*, 6 D. & L. 113, to have entitled the plaintiff to be relieved from the stay of his proceedings by the present order. The question then is, whether the statement which the plaintiff does make, "That he intends to remain in Toronto, until judgment has been obtained in this suit by him or against him" is equivalent to or can be received in lieu of the allegation, "that he does not intend again to quit Upper Canada." If it be, the order applied for should be granted. If it be not, this summons must be discharged.

It must be confessed that the actual security which a successful defendant has for his costs against an unsuccessful plaintiff merely by the residence of the plaintiff being within the jurisdiction of the court, when such plaintiff has no means of paying the costs claimed by him, or no means which can be effectually reached, is of the very slightest and most unsatisfactory description. He may by the act of last session be examined as to the means he has of paying such costs, and perhaps a judge may have the power to commit him if he do not satisfactorily answer as to his means; but although, if it can be called *security* at all, it is of a very shadowy character, and yet is the utmost which a successful and perhaps an ill used defendant can have against an unsuccessful, and it may be, a fraudulent resident plaintiff for the costs he has been put to.

It is of great consequence to a defendant to have some substantial guarantee that he will not lose his costs if he win the cause when he is sued by an insolvent plaintiff, or by one who has no property which can be reached by the process of the court, and of which he should not lightly be deprived.

On the other hand, the policy of our law is to have the courts open to all suitors poor as well as rich, for the prosecution of their rights without let or restriction, so long as the suitor is within the jurisdiction of the court; any security therefore which is demanded of him as a condition to his bringing a suit or as a condition to his prosecution of it, is an impediment thereon in the way of his getting his rights, or at all events of his trying them. He is entitled to carry on his suit free from all such security, if his residence has hitherto been and if it be still within the jurisdiction of the court, although he may intend shortly to leave it. But if his residence has hitherto been abroad, he is nevertheless entitled to carry on his suit without giving any security, if he be "within the jurisdiction of the court," provided also, according to one case, "he intend to remain within it, until judgment is obtained in the suit," or provided, according to another case, "there is a reasonable probability that he will be forthcoming when the defendant may have to call upon him to pay costs in the suit."

This is all the restraint which is reasonable, and it is all the restraint which the law can properly enforce; for it can scarcely be reasonable to require that the plaintiff shall pledge himself by oath "that he does not intend again to quit Upper Canada;" for such a stay cannot be necessary for the purposes of the suit, and such a statement can be of no sort of value, for the plaintiff may change his intention the moment judgment has been given.

For all practical purposes therefore, it appears to me that the declaration of the plaintiff that he intends to remain here "until judgment is obtained," is substantially equivalent to a declaration that "he does not intend again to quit Upper Canada," considering he may safely change his mind, the moment judgment had been given, without any fear of perjury, or without affording the court any greater control over him or over the suit which he was carrying on.

It may be that there is much cause for apprehension on the part of the defendant, that the plaintiff will not, although he does remain here until after judgment, be forthcoming when he is called upon for costs, and this is the principal point of difficulty which I have to deal with in this case; for the question is, whether I ought not to require the plaintiff by affidavit to declare that he will not leave the jurisdiction of the court without the leave of the court or of the judge, or without the leave of the defendant, until a reasonable time after the period within which the defendant may properly enter judgment, so as to enable the defendant to take any proceedings against him for the costs which the defendant may be entitled to recover. In this way it might be said that the plaintiff will have given security that he will be forthcoming when he is called upon to pay the costs. Not more than this, I think, should properly be demanded of a plaintiff before security has actually been given, and perhaps also even after security had been given to enable the plaintiff to be relieved from giving security for costs, or to be discharged from the security already furnished.

If the plaintiff could in this country, as he may in England, be taken on a *ca. sa.* for costs, I should think he had made a sufficient case on these affidavits to be relieved from the order now standing against him; that is, I think the statement, "that he intended to remain here until after judgment had been obtained against him," was sufficient to sustain this application; but as he cannot be taken here for costs, his staying here "until after judgment" is obtained, is of no use to the defendant, for the defendant cannot examine him as to his means immediately upon getting judgment, and therefore I think he ought to state as before intimated, that he will not leave the jurisdiction of this court "without the leave of the court or of a judge, or of the defendant, until the expiration of a reasonable time after the period within which the defendant may properly enter judgment against him," so as to enable the defendant to take any proceedings which he may be advised, for the costs which he may be justly entitled to, and if the plaintiff can make such an affidavit, I shall give him leave to apply again. See *Zychlenski* v. *Maltby*, 14 C. B. N. S. 326.

Plaintiff made a subsequent application, and upon giving the undertaking suggested, had the order for security for costs discharged.

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## Wilks et al. v. Holden et al.

## Ogilvy et al. v. Holden et al.

*Con. Stat. U. C. cap. 26, ss. 8, 10 & 11—Insolvent debtor—Application for discharge—Recommittal.*

*Held*, 1. That upon the facts and circumstances disclosed in the answers of defendant to interrogatories administered to him in one case, and in his oral examination in the other, that, notwithstanding the statements of the debtor to the contrary, it sufficiently appeared he had wilfully contracted the debts for which the judgments were recovered, without having had at the time a reasonable assurance of being able to pay or discharge the same.

*Held*, 2. That, under the circumstances, it was the duty of the judge to whom application was made for the discharge of the debtor, on the ground that he was not worth $20, under Con. Stat. U. C. cap. 26, sec. 11, to recommit him, which was done, until 1st June next—defendant having been in custody since 28th May, 1864, and having made his application for discharge before Michaelmas Term last.

*Held*, 3. That if plaintiff so desired, it should be a condition of the discharge that the debtor should make an assignment of his interest in the assets and effects of the firm of which the debtor was a member.

[Chambers, January 3, 1865.]

This was an application on behalf of John Henry Holden, a prisoner in execution for debt, who had been in custody since 28th May, 1864, to be discharged from custody, pursuant to sec. 8 of Con. Stat. U. C. cap. 26, on the ground that he was not worth $20, exclusive of his necessary wearing apparel, &c.

In one of the suits above mentioned interrogatories had been administered to the defendant, John Henry Holden, which he answered, and in the other, an order had been obtained for his oral examination, to which he submitted and was examined.

It appeared that defendants went into business at Merrickville in April, 1860, with a capital of $4,000; that defendant, John Henry Holden, considered the firm were doing a successful business, and had made some little profit, the exact amount of which he could not then state, up to the time of their taking stock in the spring of 1862; that in the month of March, 1863, they again took stock, the goods on hand amounting to about $1,200, about the amount he expected there would be on hand; that between 1862 and 1863 they had lost about $7,000 in a butter transaction, and about $1,000 by accommodation endorsing, and in fact their assets at the time of the taking of stock in 1863 were at least $8000 less than their liabilities; that in June, 1863, John Henry Holden went to Montreal and bought goods from various merchants amounting to a large sum of money, and from the plaintiffs to about $840; that the father of defendant is one Charles Holden, a merchant residing at Merrickville; that in 1858 he had been carrying on the mercantile business at North Gower, which business he sold out to his son Horatio and took his notes for the stock, and Charles Holden also sold to Horatio his book debts, notes, &c., of that business; that subsequently in 1860 it was arranged that John Henry Holden should go into business with Horatio and one Lindsay at North Gower; that John Henry Holden was to put $2000 into that concern; that Horatio was to to make up his share of the stock there to $2000;

that Lindsay was to put in $400 in cash; that the profits were to be divided equally; that John Henry Holden's $2000 was made up by the father accepting that amount of Horatio's stock and indorsing it on the notes he held against him; that the Merrickville stock which had belonged to the father was transferred by him to the two sons in this way; that Horatio gave his individual note for $2000 to Charles; that the father wanted John Henry to give his note for $4000 to cover $2000 of the Merrickville stock and $2000 of the North Gower stock; that John Henry declined to do this, because his father, when Horatio got married, released him from $4000, which Horatio owed him on the purchase of the North Gower stock and debts; that John Henry thought his father ought to do as well by him and so declined giving his notes for the $4000; that this caused an altercation between him and his father at the time; that the father insisted on John Henry giving his notes for the $4000, and the latter persisted in his refusal, when Horatio interfered between them, and after a little his father "dropped the matter," and John Henry added in his answer to the 23rd interrogatory, "though he did not by any means forego his claim upon me for the said amount of $4000, but from his intimating to me that if all things went well he would eventually do equally as well towards me as he had already done for my said brothers, I did hope and continued to hope that he would not call upon me for payment of the said $4000." In his examination before the County Judge he said, "I expected that my father would never call upon me for the $2000 worth of stock at North Gower, nor the $2000 worth at Merrickville. He gave me to understand that if all went well he never would call upon me for it." He afterwards explained that his examination before the County Judge lasted many hours, and he was much harassed and fatigued, and when the answers were read over to him he was not in a condition to give them that attention that would have enabled him to correct any error that might have crept into the examination; that the answer taken down from his interrogations since is the correct one; that the firm gave their note to Charles Holden for the balance of their stock over the $4000. John Henry further stated that in the latter part of August or beginning of September, 1864, Messrs. Leeming & Co., of Montreal, sued the firm; that Charles Holden having heard of it came to John Henry and demanded that he should give him his promissory note for $4000 worth of stock which had been transferred to him in the spring of 1860; that he consented and did give his individual note to his father for the $4000, who requested him to get it guaranteed by his brother Horatio; that John Henry got Horatio to guarantee the note, and then Horatio asked him to guarantee his notes which he had previously given for stock to his father, and in compliance with his brother's request he did guarantee Horatio's notes to the amount of about $3000; that the next day after giving the note to his father and guaranteeing Horatio's note, Charles Holden produced his account against the firm for rent of shop, money lent to the firm, and some other such matters, and wished John Henry to give him the note of the firm for the whole amount of his account, as well as for the $4000 note he had given him as for $2,976 of Horatio's notes guaranteed by John Henry; that John Henry gave him the note of the firm for $8,738.40; that at this very time Charles Holden owed the firm on a book account $1090, but this was not deducted from the indebtedness to him but his notes at one and two years for the amount were received in payment payable to their order at the same time; that the father sued on his note for $8738.40; that they did not defend the action, but defended actions brought by all the other creditors, except one brought by Leeming & Co.; that Charles Holden recovered a judgment against them on the 14th November, 1863, and put his writ in the Sheriff's hands; that their stock in hand was sold under the writs of plaintiff, and in Leeming's suit; that Charles Holden the father became the purchaser of the stock at fourteen shillings in the pound; that the sale took place in January, 1864; that whilst the first execution was current, and on the same day it was placed in the Sheriff's hands, and before the other creditors (except Leeming & Co.) had been able to get a judgment against the defendants, Charles Holden, who had endorsed for the defendants to a large amount, went to the Ontario bank and retired all the paper in that bank on which he and one Andrews were endorsers, amounting to $8898, some of which was due and some not due; that he did this without the knowledge or consent of the defendants, and gave his own notes for the amount endorsed by Andrews; that on the 14th of November he brought the acknowledgment of the bank to defendants; that all their notes in that bank had been paid and then demanded defendant's note for the amount he had paid or agreed to pay to take up the others, and consented to abate the interest on such as were not then due; that John Henry then gave his father, Charles Holden, the note of the firm for the amount of the notes to the Ontario bank after abating the interest; that the father sued that note and got another judgment against them by default before any of the other creditors had obtained a judgment against them; that they had of customers notes and book debts after the sale of their stock in trade, which the defendants consider good and collectable, between six and seven thousand dollars, of which they transferred to their father about four thousand dollars.

In explanation of his purchasing goods when the firm was in a state of insolvency John Henry states that only the amount of stock was taken and added up when the stock was taken in March, that the other debts and assets due the company were not then taken into consideration, and that when he made the purchases in Montreal in June, 1863, and up to the closing week of July "he had no reason or ground to believe or suspect, nor did he in the slightest believe or suspect that the financial position and standing of the firm was any other than a perfectly safe and solvent position, and he fully and honestly believed that the firm had more than a sufficiency of assets to meet all of their liabilities."

In explanation of the giving of his note to his father for $4000, he said in effect that he was justly and honestly indebted to his father in that sum, but he had hoped he would never call on

him for it; that his father had largely endorsed for them, and he expected to get his assistance in enabling them to meet the liabilities of the firm that were then pressing and to get time for the balance, and it was not prudent for him to run the risk of his father refusing to give the firm the assistance of his name, and so he consented to sign the $4000 note and get his brother to guarantee it. He added, "I did not think nor believe that he was getting the same with any intent of suing it, nor did I give it to him with any such intent," as he then hoped that with the assistance of his father the business would go on.

He assigned the same reasons for giving the note of the firm to his father the next day, and said he did not consider he and his brother were in a position to be able to refuse giving the note his father demanded. He considered his father could have sued him for the $4000 of stock, and could have sued his brother for the amount he owed him, and when he gave the note of the firm for their individual liabilities he did not suppose he had given his father any better security than he had before, and he thought if his father had intended to sue them he could have brought three suits instead of one, and it was for the advantage of the firm to give the one note to cover the three demands at the time he thought the assets of the firm would be liable to satisfy the individual debts of the partners just as much as their joint debts. He added that at the time he gave that note of the firm he did not know nor believe that his father intended to sue the firm thereon. He explained that his father insisted that for his indebtedness to the firm they should take his note at one and two years, because he had wanted that length of time for payment of the stock he had sold them, and he, John Henry, on that reason being given, consented to take the father's two notes for his indebtedness to them at one and two years, whilst he gave the note of the firm to him for their indebtedness, either on demand or at three days date. John Henry further stated that in giving the note of the firm to his father he had not "the slighest motive or purpose or intention of thereby giving his father a preference over other creditors of the firm. And when his father gave the note to an attorney for collection the firm stopped payment. He said the reason why he allowed his father to obtain judgment was that the defendants hoped to be able to make some reasonable compromise with their creditors, and they felt assured that if they succeeded in compounding their father would not press his judgment and would not strive to crush them; and moreover he was an accommodation indorser for them to a large amount, and they thought they were doing no more than right and justice demanded in making his claim as secure as might be amongst the scramble that was then being made by the creditors of the firm to secure the payment of their respective claims.

He explained as to giving the note for the amount of the notes that were in the Ontario bank; that the father was also indorser for other $6000, besides which he would have to take up and that he could sue them from time to time as the Ontario bank notes matured, and that this would make numerous costs, which would jeopardise the prospect of a compromise with their other creditors, and he, John Henry, knew their stock in hand would not satisfy the judgment their father already had against them, and as far as the rest of the creditors were concerned it would matter very little whether their father obtained the second judgment for the full amount of the notes or those only which were due. For if the defendants failed to compromise with their creditors the prospects in everything in the shape of available assets would be swallowed up to satisfy the father's first judgment; so, to avoid the costs of additional suits and wishing that the defendants should be placed in as favourable a position as possible to effect a reasonable compromise with their creditors, John Henry gave the note of the firm to his father on which the second judgment was obtained. He added that when he gave this note to his father he did not know that he intended to put the same in suit, though "he did suppose" at the time he would put the said note in suit against them as soon as possible, "but it was not given to him with any intention or disposition whatsoever upon his, John Henry Holden's part directly or indirectly, that he, the father, should thereby get a preference over other creditors of the firm." He stated also that when they stopped payment his father was worth over $20,000 over and above what would pay all his debts except such as he was liable for for endorsing for defendants, and he had been compelled to mortgage every dollar's worth of his property to the Ontario bank, and he believed if the bank and other creditors of the firm insisted on immediate payment of the suits his father was liable to pay solely on account of his becoming accommodation endorsers for the firm he would be absolutely ruined and beggared, and every dollar's worth of his property sold to satisfy alone the liabilities so named by him for and on account of the firm.

*Robt. A. Harrison* for the application.

*S. Richards*, Q. C., contra.

Richards, C. J.—Notwithstanding the statements of the defendant, John Henry Holden, to the contrary I feel bound to come to the conclusion that at the time he purchased the goods from the plaintiffs for the sum for which these actions were brought, he wilfully contracted such debt without having had at the same time a reasonable assurance of being able to pay the same. It is now admitted by him that at that time the liabilities of the firm exceeded their assets by at least $8000, and had so exceeded their assets when they took stock of the spring of 1863, in the month of March. He further states that when the stock was taken the previous year, the firm was perfectly solvent and had more than sufficient assets to meet their liabilities, and yet admitting that he knew they had lost at least $7000 in a butter speculation and $1000 by indorsing, he states in very positive terms he had no reason to believe or suspect, nor did he in the slightest suspect that the financial position of the firm was any other than a perfectly safe and solvent position. I cannot understand how he could arrive at the conclusion supposing the facts to be as he has himself admitted them.

Up to March 1862, I should infer he barely considered the firm safe and solvent with perhaps a small surplus, and yet between that and 1863 he

knew they had lost $8000, and yet doing a business that could not realise in any year a very large amount he considered their position perfectly safe and solvent, and had no reason to suspect the contrary.

He admits that he made a further purchase from these plaintiffs after he knew he was insolvent, but says at the time he contracted the debt he thought he would be able to pay it.

His explanation about giving his note to his father for the $4000 is of such a character that it is difficult to view it in the light he now represents it. He had refused to give the note when he first got the stock, and continued to do so until he was clearly and undoubtedly insolvent, then he gave his own note and got his brother to guarantee it, and he guaranteed his brother's notes, and yet all that time he did not think or believe his father was getting the same with any intent of suing it, and the next day when his father ordered him to give the note of the firm for the debt of his brother and himself, and the father's account against the firm, he then did not believe his father intended to sue the firm on the note. He did not deduct from his father's account the amount he owed the firm, but gave the note of the firm payable immediately for the full amount of his father's claim, and took the father's notes for their account against him at one and two years. When sued on this note he put in no defence, but did defend the actions brought by all the other creditors, except Leming, and his father obtained the first judgment, yet he says, in giving the note of the firm to his father, he had not the slightest intention of thereby giving his father a preference over the other creditors of the firm, and when his father gave this note to an attorney he stopped payment, but he did not defend the action nor inform his creditors how he had been induced to give the note to his father for $4000 at that particular juncture, when he had always refused to give that note before, nor why he had guaranteed the payment of his brother's note.

Then in giving the note for the demands which his father took up at the Ontario bank he "did not know," but "did suppose" at the time his father would put that note in suit, but it was not given to him with any intention on his, John Henry's part, directly or indirectly that his father should get a preference over the other creditors. He did not defend this suit or give his creditors any notice about it, and yet he takes great pains to state the particulars of his father's liabilities on account of the firm, and how he would be ruined on their account if pressed for his liabilities on their account.

It is difficult to come to any other conclusion than that the giving of all the notes was in fact to enable the father to obtain a large judgment against the firm, that through the means of that judgment the other creditors might be compelled to accept such compromise as they might offer, or in the event of the compromise not being accepted that his demand against the firm might be paid and secured as far as the assets of the firm would permit to the exclusion of the other creditors.

To show the peculiar views that John Henry has on the subject of insolvency and failing circumstances it is only necessary to refer to the foot of the seventh page of his examination before the County Judge when he says, "I did not consider myself then (on last of September or first of October) in failing circumstances, and did not consider myself so until sued by Leming. I was hard up, but thought I would get through like others." This was when he gave his note to his father for the $4000, and this was after he was fully aware that the assets of the firm were at least $7000 less than their liabilities. If I am to place a meaning on the language used by him so as to gather what his ideas of insolvency are, I shall be compelled to hold that they are not those usually held by business men as seemingly intelligent as he is. One prominent reason urged for giving the note on which his father's second judgment was obtained was to save the costs of the suits on the several notes as they might from time to time mature, yet he was conscious that the judgment his father then had would sweep away all the stock in trade of the concern, and as far as the rest of the creditors were concerned it would matter but little. Nevertheless he was anxious to save the costs of the suits. His anxiety on this ground was commendable, but it would seem to be more on account of his father than of his other creditors.

In a matter of so much importance to the defendant I am surprised that some steps were not taken to procure an affidavit of the book-keeper, Mr. Hilyard, verifying the supposed solvency of the firm in the spring of 1863, and when the purchases were made of goods in Montreal. The distance to Cleveland is not so great but communication might be had with him and an affidavit obtained. The defendant does not seem to have considered that necessary, nor does he give a satisfactory account of how or why he should have laboured under the hallucination that he was perfectly solvent when he contracted the debts now sued for.

I have carefully read and considered the answers of the defendant to the interrogatories, and the reasons and grounds on which he relies to sustain the conclusions put forth by him, and I am compelled to decide against him.

In looking at all the circumstances as they are presented before me, if I discharged the defendant out of custody I think I would be making that portion of the statute a nullity, which requires the Judge to recommit a defendant when he appears to have wilfully contracted a debt without having had a reasonable assurance of being able to pay the same.

Having arrived at the conclusion that he did wilfully contract the debt in this cause without having had a reasonable assurance of being able to pay the same I am compelled under the statute to direct his recommittal.

The defendant has been in prison since the 28th May as I understand, and this matter was discussed before me previous to last Michaelmas term. I think the ends of justice will be answered by my ordering the defendant, John Henry Holden, to be recommitted to the custody of the Sheriff of the United Counties of Leeds and Grenville, and that he be there detained in custody until the first day of June next.

If the plaintiffs should also desire to obtain an assignment of his interest in the assets and effects of the firm of J. H. Holden & Brother, I will

also make it a condition of his discharge that he make such assignment. The matter may stand over until the first February next to learn if the plaintiffs desire such an assignment. If they do not, then the order can go for his discharge next June.

Order accordingly.

## ELECTION CASE.

(*Reported by* R. A. Harrison, Esq., *Barrister-at-law.*)

### The Queen ex rel. Heenan v. Murray.

*Election of Reeve—Procedure—Time—Efficiency of election.*

Where four members of a village council, being at least a majority of the whole number of the council when full, met, and at their first meeting a resolution naming one of them as reeve was put and seconded, and no dissent was expressed, whereupon the clerk, in the hearing of all, but while two of the members were retiring from the council chamber, declared the resolution carried, the reeve was held to be duly elected.

Though the statute declares that the members of every municipal council shall hold the first meeting *at noon*, and at such meeting organise themselves as a council by electing one of themselves as reeve, an election at six o'clock, p.m., on the same day, is a sufficient compliance with the statute.

[Common Law Chambers, March 12, 1864.]

The relator complained that Thomas Murray, of the village of Pembroke, merchant, had not been duly elected, and had unjustly usurped the office of reeve of the municipality of the said village of Pembroke, under the pretence of an election, held on Monday, the 18th January, 1864, at the town hall in the said village of Pembroke; and declaring that he the said relator had an interest in the said election as one of the municipal councillors for the said municipality of the village of Pembroke, and a candidate at the said election for the said office of reeve, showed the following causes why the election of the said Thomas Murray to the said office should be declared invalid and void, viz.: first, that there was only two members of the said council, viz., the said Thomas Murray and John Supple, present when the said alleged election took place; second, that no vote in favor of the motion to elect the said Thomas Murray was given by any of the said councillors; third, that the clerk of said council illegally declared the said Thomas Murray duly elected reeve, without taking the vote of the councillors upon the motion to elect him as reeve; fourth, that the said election did not take place at noon of the third Monday in January, as required by law, but about the hour of six o'clock in the evening of that day.

The relator made oath, that he was one of the councillors for the municipality of the village of Pembroke for the year 1864; that the council of the said village of Pembroke is composed of five members; that on Monday, the 18th day of January, instant, the following four members elect of the said village council, viz., John Supple, Michael O'Meara, the said Thomas Murray, and the relator, met at the town hall of the said village of Pembroke; that Alexander Moffatt, one of the councillors elect, was not present at said meeting; that Andrew Irving, the clerk of the said council, presided at said meeting; that after the said four members of council had made their declarations of office and of qualification, it was moved by the said John Supple, and seconded by the said Thomas Murray, that the said Thomas Murray be reeve of said county; that upon the motion being put by the said clerk to the said council for their vote on the same, the relator objected to the election of the said Thomas Murray to the office of reeve, and made his objection known to the said clerk and members present of said council; that the said Michael O'Meara also objected to the election of said Thomas Murray as reeve, and made his objection known to the clerk and members present of said council, calling out in answer to the said question the words "No, no;" that thereupon, and before any vote was taken upon the said motion, the relator and the said Michael O'Meara were in the act of going out of the door of the said council room, having left their seats at the council for the purpose of leaving the same, and without any vote having been taken on the said motion, the said clerk, Andrew Irving, said that if no amendment was made to the said motion, he would have to declare the said Thos. Murray duly elected reeve of the said village of Pembroke; that no vote was taken or given by any member of the said council on or for the said motion; that the said Thomas Murray accepted the said office of reeve, and received from the said clerk, Andrew Irving, a certificate under his hand and the seal of the said corporation to enable him to take his seat as a member of the county council of the united counties of Lanark and Renfrew.

Michael O'Meara made oath, that he had heard read the statement and relation of Jas. Heenan in this matter, and that the same was true in every particular; that he also heard read the affidavit of the said James Heenan, and knew the statements therein contained to be true.

*C. S. Patterson* showed cause, and filed the affidavit of John Supple, wherein it was sworn, that he was one of the municipal councillors of the village of Pembroke; that on the 18th day of January, 1864, he attended, as such councillor, a meeting of the councillors of the said village, held in the town hall; that the following councillors were present, viz., Thomas Murray, Michael O'Meara, James Heenan, and deponent, at said meeting; that the said councillors then made the declaration of office required by law; that after the said councillors made the declaration of office, and whilst the four of them were still present, Andrew Irving, the clerk of the municipality, called the council to order and said, "Now is the time to elect your reeve," or words to that effect; that immediately after the clerk made the announcement, and whilst the four councillors were present, a resolution was placed in the clerk's hands, moved by deponent and seconded by Thomas Murray, to the effect that Thomas Murray be reeve; that the clerk read the resolution to the council, the four being still present, and said if there were no amendment offered he would have to declare it carried; that after a sufficient time had elapsed for an amendment to be put in, and there being none moved, and whilst the four councillors were still in the hall, Thomas Murray called "Question!" when the clerk again read the resolution, and, there being no dissenting voice, declared the motion carried, and that Thos. Murray was duly elected reeve of the village of Pembroke; that at the time the clerk declared the said Thomas Murry

elected, the four councillors were still present, and must have heard the declaration of the clerk, as he spoke in a loud tone of voice, and the room in which the meeting was held is small; that the said relator, James Heenan, was not a candidate for the said office of reeve, nor was there any other candidate for the said office at the said election except the said Thomas Murray, nor was the said James Heenan's name mentioned, or any other person, at said election, in connexion with the said office, other than the said Thomas Murray.

The affidavit of John Supple was corroborated by the affidavits of Richard Fallow and James P. Moffatt, both electors, who happened to be present when defendant was declared elected by the clerk.

*R. A. Harrison* supported the summons, and cited Con. Stat. U. C. cap. 54, secs. 130, 132.

Hagarty, J.—The statute directs, that the council, being at least a majority of the whole number of the council when full, shall, at their first meeting, after making the declarations of office and qualification, organize themselves as a council, by electing one of themselves to be reeve, &c. (Sec. 132.)

At the first meeting here, four councillors were present, and they should, according to the statute, have chosen their reeve.

The relator and his fellow-councillors admit that a resolution naming Murray as reeve was put and seconded; that he (relator) and the others expressed dissent, and rose to go away; that while in the act of going, the clerk said that if no amendment were moved, he would have to declare Murray elected.

Two witnesses swear in reply that no dissent was expressed to the resolution; that after ample time had elapsed, a member called "Question!" and there being no dissenting voice, the clerk declared Murray elected; that when he did so the four councillors were present, and must have heard him do so.

The fact of their being present, and hearing the clerk ask if no amendment moved, &c., is admitted.

It is quite true that the reeve should be elected by a majority. It is equally true that the councillors should, in obedience to the law, have elected, or at least fairly tried to elect, a reeve, at this their first meeting.

The relator and his friend do not assert that when they heard the clerk say he would have to declare Murray elected, they protested or made any further expression of dissent. I think, therefore, we must assume the law to have been complied with, and that when the clerk, trying to do his duty, and to obey the law, in the hearing and presence of the four councillors, declared publicly that if no amendment were moved he would have to declare Murray elected, and no one dissenting therefrom, the latter was elected by a legal vote duly made.

We all know that in representative bodies the great majority of resolutions are passed without any formal voting by yeas and nays.

I cannot but consider that this election should stand.

I think the relator and his friend tried to prevent the law being obeyed. They suggested no candidate of their own, and made no *bona fide* attempt to have a formal vote taken. Taking their own account, they rose to go away, leaving their legal duty unperformed, and heard notice given that Murray would be declared elected, if no amendment were offered.

The other objection, that this election did not take place till six o'clock, is too trivial to require serious notice.

The summons must be discharged with costs, to be paid by the relator.

Order accordingly.

## CHANCERY.

(*Reported by* Alex. Grant, Esq., *Barrister-at-Law,*) *Reporter to the Court.*

### Patterson v. Johnson.

*Injunction—Trade fixtures.*

The purchaser of the equity of redemption in certain mortgage premises erected thereon a machine shop, wherein he placed a boiler and engine, and introduced into the building three lathes, a wood-cutter, and a planing machine, all of which were worked and driven by such engine, but were in no way attached to the machine shop except by belting or similar means, when in motion; being in every other way unconnected with it or any of the fixed machinery, and capable of being removed without disturbing the machinery, or doing any damage to the realty in any way.

*Held*, on a motion to dissolve an injunction which had been obtained *ex parte*, that these articles were removeable as trade fixtures.

The distinction between chattels affixed with nails or other fastenings, and those resting by their own weight, remaining chattels or becoming part of the realty, considered and doubted.—*McDonald* v. *Weatz*, 8 U. C. Chan. Rep. 297, considered and approved of.

In this case an *ex parte* injunction had been granted restraining the defendant from removing certain articles placed in the machine shop, in the pleadings mentioned by the defendant since he had gone into possession of the premises, he having purchased from the mortgagor his equity of redemption in the property upon which the shop was erected. The defendant now moved upon affidavits to dissolve this injunction, on the grounds stated in the head note and judgment.

*Tilt*, for the motion.

*Crombie* contra.

Vankoughnet, C.—This was a motion to dissolve an *ex parte* injunction, restraining the defendant from removing from the premise certain machinery, among which are three lathes, a wood-cutter, a planing machine and a circular saw. It is as to these articles that a dissolution of the injunction is sought. The plaintiff is the mortgagee of the land, and the defendant the assignee of the equity of redemption. The defendant, and not the original mortgagor, erected upon the land a machine shop, in which he placed a boiler, engine, and the articles above mentioned, with some others. Such of the machinery as can be treated as having been affixed to, and thus become part of the realty, are doubtless covered by the plaintiff's mortgage, though placed on the land subsequently to its execution. But the defendant contends that the articles above named never were in any way affixed to the realty—never became a portion of it; were but deposited in the machine-shop—worked there from time to time, but in no way attached to it except by belting or some such means when in motion—in every way disconnect-

ed with it, or any of the fixed machinery, and capable of being removed without disturbing it or doing any damage to the realty in any way—in fact portable. This contention of the defendant is, I think, established, although the affidavits on behalf of the plaintiff would lead to the contrary conclusion, and give the idea that all these portions of the machinery were fastened in and to the building, so as to be immoveable without drawing nails or bolts. Yet I think the defendant's affidavits more explicit and reliable as to the exact state and position of the machinery, and accordingly I will for the present, assume them to be true, giving to the plaintiff the opportunity to cross-examine the defendant's witnesses if he desire it, he proceeding promptly to do so.

Assuming, then, the state of facts represented by the defendant to be true, I am of opinion that I cannot treat the machines in question as part of the realty, but must consider them as chattels removable at the will of the owner, subject to sale by him and to execution against his goods. I have read carefully and with great interest the judgments of the Queen's Bench here in *Gooderham* v. *Denholm* 18 U. C. Q. B. 203, and of my brother Spragge in *McDonald* v. *Weeks*, 8 U. C. Chan. R. 297. I think there is strong reason and good sense in the remarks of my brother Spragge in the latter case. It does seem in many cases that could be put, but a flimsy distinction that articles are fixtures, when nailed or screwed or bolted into a building, and are not so when their own weight gives them steadiness in their place without such aid. Take the case of a house which by its own weight sustains its position on the ground; the owner does not want a cellar, perhaps, has no need to let it into the ground, or to require any foundation for it other than the surface of the ground itself. Could it be said that this was a chattel which did not pass under a deed of the land, which the owner evidently intended to improve and benefit by the erection of it? But while there might be little difficulty in treating such a structure as part of the realty, the character to be given to such articles of less bulk, such as machines used on the realty or in connection with the fixtures (in the literal sense of the term,) erected on the land, is not so plain. Where such an article as a boiler or engine is built into a house or fastened upon the land, it may well be called a fixture: it literally is so, and the owner may be considered as having devoted so much of the realty, at all events, as is necessary for the use of such machinery, to the purpose of it, and of having thus intended to benefit the realty. But there is great difficulty in extending this character to articles of machinery which have not been actually affixed to the land, such as those in question here. As I understand the evidence, the defendant erected a machine-shop, into which he fastened a boiler and engine. With this engine, to the extent of its power, he could drive any machinery for which the building was adapted, and which he chose to introduce into it He has there at present a circular saw, a wood-planer, and lathes. He may choose to abandon this description of machinery and introduce something else. He has not in any way declared his intention of making these part of the realty: he has not in fact made them part by attaching the one to the other. The articles are all portable—can be moved by hand from place to place in the building, and out from the building. It is true they are there to be used with certain fixed machinery, with which they can be connected from time to time for the purpose of moving them. But can I say that for this reason they have become fixtures?

I have had the advantage, since the decisions in our own courts above quoted, of examining the following recent authorities bearing more or less upon this question. *Wilson* v. *Whateley*, 1 John & H. 486; *Jenkens* v. *Gething*, 2 John & H. 520; *Haley* v. *Hammersley*, 7 Jurist, N. S. 765, in which Lord Campbell approves of the judgment of Vice-Chancellor Wood, in *Mather* v. *Fraser*, 2 Kay & J. 536; *Bates* v. *Beaufort*, 8 Jur. N. S. 270; *Gibson* v. *Hammersmith*, &c., 9 Jur. N. S. 221. While in many cases articles which have been merely attached to the freehold by nails or screws have been held removable as chattels, when this can be effected by simply drawing the nails or screws without doing damage, I find no case in which portable machines, such as the present, have been treated as fixtures irremovable, when they have not been fastened or attached in some way to the land. This distinction seems to be preserved, not merely for convenience, but because the law leans in favor of trade by treating, when it properly can, articles used in trade as disposable chattels. While, as I have already remarked, on the one hand, the distinction between articles resting by their own weight in a particular position, and articles sustained in it by nails or bolts seems a flimsy one, and not readily sustained by any principle, (a distinction, however, not always observed, as pointed out before;) on the other hand, where this evidence of intention to make any article, in itself a chattel, a part of the realty, and when the act of affixing it there are wanting, it will be almost impossible, in any case, to say what things remain chattels, and what have become part of the freehold.

I think I must treat the machines in question here as chattels.

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## Gordon v. Ross.

*Mortgagor and mortgagee—Insolvent Act—Power of sale.*

Where a mortgagor becomes bankrupt the mortgagee is not compelled to go in under the act, but may proceed to sell the property under a power of sale in his mortgage.

This was a motion for an injunction to restrain the sale of a steamboat by a mortgagee under a power of sale contained in his mortgage. The plaintiff was the assignee in insolvency of the mortgagors.

*Hoskin* for the motion contended that under the Insolvent Act of 1864, section 5, sub-sec. 5, a mortgagee's only remedy was to file a claim in the matter of the insolvency, when the proceedings would be taken which that sub-section points out. He referred also to 9th and 12th sub-sections.

*Crombie* contra, referred to the 4th and 5th sub-sections as shewing that it was not compulsory on the mortgagee to proceed under the insolvency.

Mowat, V. C., refused the injunction, and held

that a mortgagee was not obliged to file a claim, but was at liberty, in lieu thereof, to exercise the power of sale contained in his mortgage.

## CHANCERY CHAMBERS.

(*Reported by* Alex. Grant, Esq., *Barrister-at-Law, Reporter to the Court.*)

### Winters v. the Kingston Permanent Building Society.

*Sheriff's poundage—Con. Stat. U. C., c. 22, sec. 271.*

The plaintiff had obtained a decree in this cause against the defendants, by which money was ordered to be paid, and on which the plaintiff issued execution and lodged it in the hands of a sheriff. After seizure under the writ, but before the money was levied, the defendant moved for and obtained leave to re-hear the cause, and a stay of the execution, on the terms of paying the money into court, which was done; *Held*, that the sheriff, not having actually levied the money under the execution, was not entitled to poundage, but to fees only for services actually rendered, to be settled by a judge in chambers.

A decree had been pronounced herein in favor of the plaintiff, directing the defendants to pay him a certain sum of money and his costs of the suit. Execution had been sued out by the plaintiff to enforce the payment of these amounts, and placed in the hands of the sheriff of Frontenac; after the sheriff had seized under the execution, but before any sale had taken place, or any money been levied, the defendants moved for and obtained leave to re-hear the cause, and the execution had been stayed on the terms of paying the money into court, and the costs to the plaintiff's solicitors, they undertaking to pay them if the decree should be reversed. The money and costs had been duly paid accordingly, and a re-hearing had taken place, and the decree been upheld; and now the the sheriff presented his petition, praying payment, by the defendants, of his poundage on the money and costs.

*S. H. Blake*, for the petitioner. The sheriff is entitled to poundage if goods are seized and the money made, though the money be not paid to him or pass through his hands: *Morris* v. *Boulton*, 2 U. C. Cham. R. 60, 67, 70; *Thomas* v. *Cotton*, 12 U. C. Q. B. 148; *Brown* v. *Johnson*, 5 U. C. L. J. 17.

*Sullivan* contra. The application is improperly made by the sheriff; the sheriff's remedy is against the plaintiff, not the defendants.* The case of *Morris* v. *Boulton* was decided on the authority of English cases which have since been overruled on this point, by the case of *Miles* v. *Harris*, 31 L. J. C. P. 361; 6 L. T. N. S. 649.

*S. H. Blake*, to cure the objection as to the mode of the application, appeared for the plaintiffs also, and consented to the order going.

Vankoughnet, C.—The execution having issued out of this court under the decree originally made in the cause, the sheriff seized under it certain mortgages of the defendants for the purpose of making the money. The defendants thereupon presented a petition for re-hearing, and applied to have execution stayed in the meantime. Both applications were granted on the defendants paying into court, as they subsequently did, the full amount of the debt, interest and costs, not including the sheriff's fees or poundage, as to which no provision was made. The petition of re-hearing was dismissed, and the money in the court paid out to the plaintiff. The sheriff now presents a petition, asking that the defendants may be ordered to pay his fees and poundage upon the money brought into court, alleging that he would have made that money under the writ in his hands, had not its execution been stayed by the order of this court. Independently of the statute to which I shall presently advert, there seems to have been no settled notion, as to the practice which prevails here in similar cases at law. *Morris* v. *Boulton*, 2 U. C. Cham. R. 60, before Burns, J., decides, that, under such circumstances as the present, the sheriff is entitled to poundage; see on the same subject *Brown* v. *Johnson*, 5 U. C. L. J. 17; *Thomas* v. *Cotton*, 12 U. C. Q. B. 148. The language of the two judges, Erle, C. J., and Willes, J., who expressed their opinions on this question in the recent case of *Miles* v. *Harris*, 31 L. J. C. P. 361, is not quite reconcileable, although they concurred in judgment. The 271st section, however, of the Common Law Procedure Act, ch. 22, of the Con. Stats. of U. C., which assumes to condense and explain, though it materially alters in this respect, the provisions of the Statute 9th Vic., ch. 56, sec. 2, enacts that "In case the real or personal estate of the defendant be seized or advertised on an execution, but not sold by reason of satisfaction having been otherwise obtained, or from some other cause, and no money be actually levied on such execution, the sheriff shall not receive poundage, but fees only for the services actually rendered; and the court out of which the writ issued, or any judge thereof in vacation, may allow him a reasonable charge for any service rendered in respect thereof, in case no special fee be assigned in any table of costs." The practice of this court is, by statute, made analogous to that at law, on proceedings by execution. It seems plain, therefore, under the clause of the statute just quoted, that the sheriff is not entitled to poundage, but only to fees for services actually rendered, to be fixed by the court or a judge in Chambers. The words "money actually levied," contrasted with the preceding words, mean, I think, money actually obtained by the sheriff himself, out of the goods. There would have been a difficulty in the application at the instance of the sheriff, had not the plaintiff appeared in support of it. The immediate remedy of the sheriff is ordinarily against the party who sets him in motion, and the plaintiff might have made such arrangements with the defendants as would have deprived him of any right, and the sheriff of any right in his name, to proceed against them. The plaintiff, however, consenting, and the proceedings having been stayed for the benefit of the defendants, let the petition stand over with liberty to the sheriff to produce before me evidence, to satisfy me what charges it would be reasonable to allow him, for his action in the matter, and for the recovery of these he may be allowed to proceed on the execution which is now in abeyance.*

* See *Thomas* v *Great Western Railway Co.*, Q. B., Hilary Term, 1865.—Eds. L. J.

* See Editorial remarks on page 86, *ante*.

(*Reported by* Thos. Hodgins, Esq., LL.B., *Barrister-at-Law.*)

## Beaton v. Boomer.

*Security for Costs—Form of Bond—Practice.*

*Held*, 1st. That it is for the plaintiff's convenience to submit the name of the proposed surety to the opposite party before filing the bond, as he may risk the surety not being successfully objected to by the defendant, and it is not necessary that the surety should be first approved by the defendant's solicitor or the registrar, nor is a plaintiff bound to give more than one surety unless he alone is insufficient.

2nd. That the bond for security for costs should contain the condition, to the effect, that upon the surety (and not the plaintiff) paying the costs, the obligation should be void.

This was an application by one of the defendants to take off the files of the court a bond given on behalf of the plaintiff for security for costs, on the following grounds: 1. That the plaintiff did not deliver to the defendant's solicitor a note of the name and description of the person proposed as surety before executing and filing said bond. 2. That the bond was filed before being allowed, as sufficient security, by the defeneant's solicitor or the registrar. 3. That the bond contains the name of but one surety instead of two, and no opportunity was given the defendant's solicitor to ask for two sureties. 4. That the condition of the bond is to the effect, that if the plaintiff should pay the costs awarded against her, the obligation to be void; whereas it should be upon the surety or sureties paying such costs, the same should be void.

*Boyd* for the defendant Somerville.

*Hodgins* for the plaintiff.

Vankoughnet, C.—I do not think there is anything in the first three objections. The practice in England, though I am informed it is not usually followed in this country, appears to be for the plaintiff's solicitor to submit to the opposite solicitor the name of the proposed surety or sureties, and if no objection is made to them, then to prepare the bond. This is a course rather for the plaintiff's own convenience, which he may or may not follow as he pleases (Smith's Ch. Pr. 775, 6th ed.) If he chooses to risk the surety not being objected to successfully, he may file his bond and give notice thereof. The plaintiff is not bound to give more than one surety, unless he alone is insufficient (Smith's Pr. 775; Aycbourn's Pr. 409). Indeed, the order for security provides for procuring as surety a sufficient person or persons. I think, however, that the fourth objection must prevail. In all forms of bonds to be found, the condition of the bond is absolute that the sureties will pay the costs: and this form, so universally adopted, should be adhered to. Indeed the order for security requires an absolute, not a conditional undertaking. It was, doubtless, intended that the defendant should not be driven first to make a demand upon the plaintiff living in a foreign country, or to prove that he had not paid the costs before calling upon the surety to pay them.

## INSOLVENCY CASES.

(Before His Honor S. J. Jones, Judge County Court Brant.)

(*Reported by* H. McMahon, Esq., *Barrister-at-Law.*)

## Henry v. Douglass.

*Attachment under Absconding Debtors Act—Attachment under Insolvent Act—Priority.*

Where a writ of attachment under the Absconding Debtors Act is received by a sheriff and acted upon by attaching defendant's goods, and afterwards writs of *fi. fa.* are placed in his hands against defendant, and he subsequently receives an attachment against defendant under the Insolvent Act of 1864, *Held*, that defendant's property passed to the official assignee, but that the assignee would be obliged to give the execution creditors the priority to which they would be entitled.

A writ of attachment had issued against the defendant under the Insolvent Act of 1864, to which the Sheriff of the county of Brant made the following special return: — "That before he received the writ he had attached all the defendant's property under an attachment out of the county court of the county of Brant against the defendant as an absconding debtor, at the suit of John Gardham, and that he held such property to satisfy such attachment, and also a warrant of attachment out of the division court, at the suit of James Weyms, in which, judgment was obtained and execution issued before the receipt of the writ in this matter, and also for the benefit of any other attaching creditor, under the Absconding Debtors Act, who should attach in due course of law. That the personal property attached being perishable, he had caused it to be sold, and that the proceeds were insufficient to satisfy the said attachments. That also, before he received the said writ, two *fi. fas.* against the goods and one *fi. fa.* against the lands of the said defendant, were placed in his, the said sheriff's, hands, and that, therefore, he could not place the property and effects of the said defendant in the hands of an assignee or guardian until relieved from the responsibilities and liabilities to the said attaching and execution creditors."

A summons was obtained by *VanNorman*, on 14th December, 1864, on reading the plaint in the declaration, and the writ of attachment issued under the Insolvent Act of 1864, and the sheriff's return thereto, calling on the sheriff of the county of Brant to shew cause why he should not amend his return, and why he should not execute said writ, and make a proper return thereto. On the return of the summons the sheriff appeared in person, and contended that under the writ of attachment against the defendant as an absconding debtor (at the suit of Gardham) he was compelled to seize and hold the property; and that as the plaintiff in this suit was one of those who, by his affidavit, procured the issuing of Gardam's attachment, he is now estopped from seeking to set aside Gardham's writ.

*Totten* on the part of the creditors holding *fi. fas.*—The attachment under the Absconding Debtors Act, the *fi. fas.*, and the attachment under the Insolvent Act, are all issued from the same court—that is, the county court, and consequently they must take precedence according to their priority in point of time. By sec. 2, sub-sec. 7, and sec. 3, sub-sec. 22 of the Insolvent

Act, the writ in insolvency can only affect the estate of the insolvent as it stood at the time of the issuing of the attachment under the Insolvent Act, and at that time the Insolvent had no estate —it was in *custodia legis*.

*Griffin*, in support of summons.—Sec. 3 Insolvent Act of 1864, makes the act of absconding an act of insolvency, otherwise any creditor taking out an attachment against an absconding debtor would defeat the Insolvent Act (*Notley* v. *Buck*, 8 B. & C. 160; Arch. Bkp. Law 176). Here the sheriff has notice of the insolvency proceedings before he pays over the money. The assignee has power to investigate fraudulent claims and settle priorities. An attachment against an absconding debtor is only the taking and holding the defendant's goods as a security for the plaintiff's claim, and the claims of such other attaching creditors under the Absonding Debtors Act as shall attach in due course of law. As to how creditors shall be dealt with who have securities, see sec. 5 sub-sec. 5 Insolvent Act.

Jones, Co. J.—I will refer to those sections of the Insolvent Act relating to the matter in question. Sec. 2, sub-sec. 7 provides that the assignment shall vest in the assignee the books of account and all the estate, &c., of the insolvent, *which he has* or may become entitled to at any time before his discharge, &c. And by sec. 3, sub-sec. 22, it is enacted that (in cases of compulsory liquidation like the present) by the effect of the appointment of the official assignee the whole estate and effects of the insolvent, *as existing at the date of the issue of the writ*, and which may accrue to him up to the time of his discharge, shall vest in the said official assignee, in the same manner and to the same extent and with the same exceptions as if a voluntary assignment had at that date been executed in his favor by the insolvent. Sec. 4, sub-sec. 9 provides that the assignee may in his own name sue for the recovery of all debts due to the insolvent, and in the prosecution and defence of suits may take all proceedings the insolvent could, and may intervene and represent the insolvent in all suits by or against him *which are pending at the time of his appointment*, and may have his name inserted in place of that of the insolvent.

Sec. 5, sub-sec. 4 enacts that in the preparation of the dividend sheet due regard shall be had to the rank and privilege of every creditor, *which rank and privilege, upon whatever they may be legally founded, shall not be disturbed by the provisions of this act.* And the 9th sub-sec. of the same sec. provides "that the costs incurred in suits against the insolvent after due notice of an assignment or of the issue of a writ of attachment in compulsory liquidation has been given according to the provisions of said act, shall rank upon the estate of the insolvent."

I had delayed giving judgment in this matter in hopes that the rules and regulations to be framed by the judges of the superior courts, as provided by the 18th sec. of the act would throw some light on the point in question; but although a tariff has been made, no rules have been published. In the English Act special provision is made for cases like the present. There the sheriff is not the officer who executes the process issued out of the bankrupt court, and the whole procedure in bankruptcy is so different from ours as to afford but little assistance in construing our statute. It is to be hoped that the legislature will, by proper amendments of the Insolvent Act, place the law in question on a more satisfactory footing, and also provide some method by which a set of rules and regulations for working the act may be framed, that shall be applicable to the whole of Upper Canada, instead of leaving it, as it is at present, for every county judge to frame separate rules for his own guidance.

I have had great difficulty in arriving at a decision in this matter that is satisfactory to myself; but after carefully examining the act and the cases as far as I have been able, I have come to the conclusion that notwithstanding the writs at law in the sheriff's hands against the defendant's property, his whole estate is subject to liquidation under the Insolvent Act, and that the attaching and execution creditors must come into that court, where they could no doubt claim such priority as they would be entitled to, on account of the proceedings that they have taken at law. As far as the executions are concerned, there can be no doubt, if the judgments are regular, and the writs are properly in the sheriff's hands before the issue of the attachment from the insolvent court, that they would have a priority, and would require to be first satisfied out of the insolvent's estate. But as the whole property, real and personal, of the insolvent is held by these writs, and this property may, for aught we know, be far more than sufficient to satisfy these writs, and as it is impossible to separate as much as may be sufficient to satisfy these executions from the residue of the insolvent's estate, the only course in my opinion that can be adopted is, for the whole estate to pass into the hands of the assignee, who would be obliged to give the execution creditors that priority that they would be entitled to. This is also the course that I think would be suggested by sec. 5, sub-secs. 4 and 9, above cited, and the other clauses of the act above referred to are reconcilable with the assignee giving to these creditors their priority in the distribution of the assets of the estate.

In holding that the *fi. fas.* in the sheriff's hands cannot have the effect of keeping the estate out of the hands of the assignee, it follows, of course, that the attachments against the defendant as an absconding debtor cannot have that effect. The Absconding Debtors' Act, it is true, provides for a certain distribution of an insolvent's estate; but I think it could never be argued that the Legislature in passing the Insolvent Act, intended that it should be inoperative merely because one creditor, after an act of bankruptcy committed by his debtor absconding, should choose to take out an attachment against him as an absconding debtor, especially where, as in this case, no other creditor could adopt that proceeding, the defendant being now within the jurisdiction of the court

The Insolvent Act does not contemplate any other equitable distribution of the insolvent's estate except under that act. And it even provides that any *general assignment* for the benefit of creditors (no matter how equitable) made by the debtor, except it be made under the provi-

sions of that act shall not only be ineffectual but shall be an act of insolvency, rendering the estate liable to compulsory liquidation under the act (see sec. 8, sub-sec. i.) If the attaching creditor has a priority by virtue of his attachment, it will be the duty of the assignee to allow it to him under sec. 5, sub-sec. 4 of the act.

I therefore order that the sheriff do amend his return to the writ of attachment issued in this matter accordingly. The costs of the plaintiff's attorney to be costs in this matter.

## GENERAL CORRESPONDENCE.

*Scatcherd's Cheap Law Bill.*

Toronto, Feb. 25, 1865.

To the Editors of the Local Courts' Gazette.

Gentlemen,—Will you not again take up the subject of Mr. Scatcherd and his Law Costs bill or motion, and advise the profession in the matter?

Would it not be well for a meeting of attorney to be called, and a committee appointed, to draft a petition in the premises, and have it duly presented to the House of Parliament?

Something should be done.

Yours truly,

An Attorney.

[In April, 1863, we fully expressed our views on Mr. Scatcherd's Cheap Law Bill. (See 9 U. C. L. J. 85.) Our remarks then made received the approval as well of the public as of the profession. Some one, unknown to us, did us the honor of having our remarks republished in the form of a circular, and mailed to members of Parliament and others.

We had hoped that even Mr. Scatcherd would by this time have seen the folly of his pet bill. If he aspires to the dignity of half a statesman, we shall look for something better from him than this stupid piece of buncomb. It is a mistake to suppose that lawyers are especially interested in the death of such a measure. The persons really interested are the public. To cheapen litigation will be to make it more plentiful; and lawyers, like other members of the human family in the social scale, can prosper on "small profits and quick returns." If the bill, or anything half as absurd, become law, we venture to affirm that lawyers will have twenty suits for every one that is now entered in court. The profession, in a pecuniary point of view, will not suffer; but the public, whose interest it is that there should be little litigation, will be the real sufferers.

Some people are astonished that in Canada, with a population so sparse, compared with that of the mother country, suits are so plentiful—that while in some of the larger cities of England we read of two or three records at most entered for trial at an assize, we find twenty times the number in towns in Upper Canada, where the population is twenty times less than at home. The secret is, that in Canada a suit costs at least five times less than a suit in England. Then cheapen the suit in Canada by making it five times less than it now costs, and the certain increase in number is a mere matter of computation. Men of ordinary intelligence are alive to this state of things, and it is to be hoped that Mr. Scatcherd, if really in earnest, will some day or other acquire sufficient intelligence to realize the depth and breadth of his folly.—Eds. L. J.]

## MONTHLY REPERTORY.

### COMMON LAW.

T. T., 27 Vic.

Hogan v. Morrissey.

*Judgment against executor—Action on—Plene administravit—Replication, lands—Effect of.*

Action on a covenant recovered against an executor. The declaration set out a judgment recovered; alleged the issuing of a *fi. fa.*, and a return of "*nulla bona*," and suggested a devastavit. Plea, that in the action on which this action is founded, the defendant pleaded *plene administravit;* that the plaintiff replied lands, on which judgment was given; that the lands were assets in the hands of the defendant as executor. The defendant then avers that the lands are sufficient, and that plaintiff has not proceeded against them.

Demurrer to pleas, on the ground that where a judgment has been recovered, and a devastavit is shown, it is not a sufficient reason to excuse the defendant from personal liability, that the plaintiff has obtained a judgment to recover of the lands of the testator.

*Held*, that the replication of lands is a full admission of the truth of the plea of plene administravit; that the plaintiff, by his replication in the former action, being estopped from setting up a devastavit now, the defendant is at liberty to show the true state of the case, to save himself from personal liability; that the replication (of lands) commonly used since *Gardiner* v. *Gardiner*, is both illogical and unnecessary. (14 U.C. C. P. 441.)

T. T., 27 Vic.

Roe et al. v. McNeill et al.

*Ejectment on sheriff's deed—Improper recitals in—Purchaser not estopped by.*

An action of ejectment on a sheriff's deed which recited "That by a *ven. ex.* I have seized as the lands of A. M. that certain tract, &c., and whereas the said premises since the seizure by me, made by virtue of the said writ of *ven. ex.*, after due notice were exposed to public sale," &c., and then granted to the purchaser.

It appeared that the lands had been seized under a writ of *fi. fa.* previously issued, and placed in the sheriff's hands, and that the *venditioni exponas* ordered him to expose to sale and sell the lands so seized.

*Held*, that the misrecitals of the acts of the sheriff in the deed did not invalidate the deed itself; that the purchaser was not nor were the plaintiffs estopped by such recitals, and therefore plaintiffs might shew what the facts were; that recitals did not exclude the presumption of a proper seizure on the *fi. fa.*

That as the debtor attorned to the purchaser the defendant could not impeach the purchaser's title so long as she retained the possession of the person making the attornment.

This decision is not inconsistent with that in the same case, reported in 13 U. C. C. P. 189. (14 U. C. C. P. 424.)

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M. T., 28 Vic.

Gaynor et al. v. Salt.

*Practice in sending papers filed to Nisi Prius.*

Papers filed in court should not be sent away to be used as evidence at *Nisi Prius*, unless when the originals are essential, and the party applying to have them transmitted has some right in them, or the interests of public justice require their transmission; and in that case the officer sending should take a voucher from the officer receiving them. (24 U. C. Q. B. 180.)

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Ex., Jan. 18.

Boosey v. Wood.

*Libel—Pleading—Accord and satisfaction—Acceptance of.*

To an action of libel—plea, that it was agreed to accept, in satisfaction, certain mutual apologies, to be published in certain newspapers, which were published accordingly.

*Held*, a good plea of accord and satisfaction. (13 W. R. 317.)

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Ex. C., Nov. 26.

Tipping v. St. Helen's Smelting Co.

*Nuisance to land.*

Every man is bound to use his own property in such manner as not to injure the property of his neighbour, unless, by lapse of time, he has acquired a prescriptive right to do so. The law does not regard trifling inconveniences, and every thing must be looked at from a reasonable point of view. In an action for a nuisance to property by noxious vapours, the injury must be such as visibly to diminish the value of the property and the comfort and enjoyment of it. In determining the question, all the circumstances must be taken into consideration; and in places where great public works develop the material wealth of the country persons must not stand upon extreme rights. (13 W. R. 289.)

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Q. B., Jan. 26.

Anon v. Parr.

*Practice—Interrogatories—C.L.P. Act* 1854, *s.*51.

Interrogatories will not be allowed to be administered for the purpose of eliciting from the defendant whether the plaintiff has a legal cause of action, or what cause of action he has, but only in aid of a cause of action stated by him.

*Quære*, whether the plaintiff can apply to administer interrogatories before declaration. (13 W. R. 337.)

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Ex., Jan. 26.

Mason v. Mitchell.

*Married Woman—Desertion—Order for protection.*

An order for protection obtained by a married woman who has been deserted by her husband, does not protect property acquired by her by immoral practices. (13 W. R. 349.)

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E. & A.

Westacott v. Powell.

*Seduction—Loss of service—Birth of child.*

In an action for the seduction of the daughter of the plaintiff, the action may be maintained before the birth of the child; but

*Per curiam*, (Spragge, V.C., and A. Wilson, J. dissenting) the statute (Con. Stat. U. C. cap. 77) does not dispense with evidence of a pecuniary loss or damage, such as was required before the act. (2 E. & A. Rep. 525.)

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## CHANCERY.

L. J., Jan. 14, 16.

Parkinson v. Hanbury.

*Settled account—Mortgagee in possession—Agent—Wilful default—Sale under power.*

Where a defendant sets up by his answer a settled account in which no specific errors are charged by the bill, the bill is properly dismissed.

Mortgagees, under a conveyance in trust to sell, to secure principal and interest, take possession, not as mortgagees, but as agents of the mortgagor.

In a suit for redemption, *held* (1) that the mortgagees will not be ordered to account on the footing of wilful default; (2) that a purchase by the mortgagees of the mortgaged property from a prior mortgagee, selling under a power of sale, will be set aside as a purchase by a trustee, of trust property. (13 W. R. 331.)

Chan. Cham.

Montreal Bank v. Auburn Exchange Bank.

*Amendment of bill in respect of matter arising subsequent to the filing of it.*

The plaintiffs had obtained a judgment at law against P., one of the defendants, upon confession, and, as judgment creditors under that judgment, had filed their bill to set aside a prior judgment of other defendants, and had moved for and obtained an injunction to restrain a sale of the goods of P. under such prior judgment. After the injunction had been granted, the plaintiffs obtained another judgment against P., not upon confession, but by default. Under these circumstances, a motion for leave to amend the bill, by alleging the recovery of the second judgment, was granted. (Gr. Cham. Rep. 283.)

Chan. Cham.

Ruttan v. Smith.

*Enlargement of motion.*

Where a party moving is not in a position to sustain his motion, the court will not grant an enlargement so as to enable him to place himself in a position to sustain it; the motion must lapse. (Gr. Cham. Rep. 286.)

Chan. Cham.

Fellis v. Todd.

*Staying suit till security given for the costs of a prior suit at law.*

The plaintiff (a vendor) had sued at law to recover the purchase money due under an agreement for the sale of lands, but had failed, and the costs of the action were given against him; the defendant (the vendee) issued a *fi. fa.* goods to recover the costs, which was returned *nulla bona.* Afterwards the vendor filed his bill in equity to enforce specific performance of the contract. On motion of the defendant in the suit, the proceedings in equity were stayed till security for the costs at law should be given. (Gr. Cham. Rep. 285.)

## INSOLVENTS.

| | |
|---|---|
| Andrew Smith | Manilla. |
| W. H. Vantassel | Sidney. |
| Patrick Langrill | Toronto. |
| Daniel J. Woodward | Tp. Rawdon. |
| M. Elliott | Cainsville. |
| Jacob Bowman | Harrisburg. |
| Chas. F. Smith | Belleville. |
| P. F. Cannifff | Thurlow. |
| D. L. Comins | Madoc. |
| George Baghurst | Montreal. |
| N. Bloodsworth | Cainsville. |
| Richard Benner | Hamilton. |
| Chas. Roy Lapense | Levis. |
| Wm. Dickson | Montreal. |
| Henry Murren | Montreal. |
| Henry Weeks, John Weeks | Woodstock. |
| John Mathie | Lindsay. |
| James Ross | Tp. Whitby. |
| Wm. Wade Rutledge | Guelph. |
| Smart & Beamish | Port Hope. |
| D. N. Black | Stratford. |
| Duncan McNaughton | Chatham. |
| S. D. Merick | Easton's Corners. |
| J. C. Thauvette | St. Marthe. |
| John Brown | Toronto. |
| J. T. Taylor & Co | Hamilton. |
| Zephin Lizee | Montreal. |
| Joseph Parker Lane | Morven. |
| Wm McBain, Francis Stephen | Montreal. |
| Van Every & Rumball | Goderich. |
| Peter E. Roussin | Montreal. |
| W. D. Woolsey | Quebec. |
| Jas. Crawford | Kingston. |
| Thos. Davis | Windsor. |
| John T. Wilson | Woodstock. |
| R. T. Routh | Montreal. |
| Fortunatus P. Wood | East Farnham. |
| John M. Baker | Sterling. |
| Wm. H. Birt | Mitchell. |
| Matthew C. Brown | Simcoe. |
| Joseph Faulkner | Hamilton. |
| Henry Webster | Uxbridge. |
| Geo. Wilson | Port Dover. |
| Boswell Heneman | Montreal. |
| R. H. Burtch | Tp. Blandford. |

## APPOINTMENTS TO OFFICE.

### SURROGATE CLERK.

SIR JAMES LUKIN ROBINSON, Baronet, of Osgoode Hall, Barrister-at-Law, to be Surrogate Clerk, under the provisions of the chapter 16, Consolidated Statutes of Upper Canada. (Gazetted March 4, 1865.)

### COUNTY ATTORNEY.

EDWARD TAYLOR DARTNELL, of Osgoode Hall, Esq., Barrister-at-Law, to be Clerk of the Peace and Crown County Attorney, for the United Counties of Prescott and Russell. (Gazetted March 4, 1865.)

### CORONER.

GEORGE C. McMANUS, Esq., M.D., Associate Coroner, County of Simcoe. (Gazetted March 18, 1865.)

### NOTARIES PUBLIC.

GEORGE AIREY KIRKPATRICK, of Kingston, Esq., Barrister-at-Law, to be a Notary Public in Upper Canada. (Gazetted March 4, 1865.)

SAMUEL BICKERTON HARMAN, of Toronto, Esquire, to be a Notary Public in Upper Canada. (Gazetted March 4, 1865.)

ARTHUR MANDEVILLE RICHARDS, of Clinton, to be a Notary Public in Upper Canada. (Gazetted March 4, 1865.)

HUGH McKENZIE WILSON, of Brantford Esq., to be a Notary Public in Upper Canada. (Gazetted March 4, 1865.)

JOHN M. BRUCE, of Hamilton, Esq, Barrister-at Law, to be a Notary Public in Upper Canada. (Gazetted March 18, 1865.)

JAMES SWIFTS, of Kingston, Esquire, to be a Notary Public in Upper Canada. (Gazetted March 18, 1865.)

## TO CORRESPONDENTS.

"An Attorney"—under "General Correspondence."

"L." We hope to make use of the contents of your letter of 10th February, in our next.

"Several Readers"—"A Subscriber"—"B. S. B."—will receive attention in our next.

"One who sat next Mr. K. at the oral."

We find that you are correct in stating that Mr. Kirkpatrick was not "called" without a *viva voce* examination. The papers of the gentleman who *was* passed without an oral were most creditable. The next in number of marks would probably be our correspondent.

Whilst regretting that any mistake should have occurred in this matter, we cannot forbear to remark upon the extreme difficulty which we, amongst others, have experienced in obtaining from the proper authority information with respect to matters of this kind, in which the profession are more or less interested, and which there is not the slightest reason or excuse for withholding, except the whim or caprice of its custodian. Our Correspondent, naturally enough, imagines that the party alluded to affords us every information (consistent with his duties to his office and ease to himself) connected with the *public*, so to speak, proceedings of the Law Society. Such however is not the case, and we have hitherto been obliged to obtain our information from various sources, as best we could.

## DIARY FOR MAY.

1. Mon ... *St. Philip and St. James.*
7. SUN ... *3rd Sunday after Easter.*
14. SUN ... *4th Sunday after Easter.*
15. Mon ... EASTER TERM begins.
17. Wed ... Last day for service for County Court.
19. Frid.... Paper Day Q. B. New Trial Day C. P.
20. Sat. ... Paper Day C. P. New Trial Day Q. B.
21. SUN ... *Rogation.*
2 . Mon ... Paper Day Q. B. New Trial Day C. P.
23. Tues ... Paper Day C. P. New Trial Day Q. B.
24. Wed ... Paper Day Q. B. New Trial Day C. P. Queen's [Birthday.
25. Thurs.. Paper Day C. P. *Ascension.*
26. Frid.... New Trial Day Q. B.
27. Sat .... Easter Term ends. Declare for County Court.
28. SUN ... *1st Sunday after Ascension.*
31. Wed ... Last day for Court of Revision fin. to rev. A. Rl. [and for County Court to revise Tp. Roll.

## NOTICE.

*Owing to the very large demand for the* Law Journal *and* Local Courts' Gazette, *subscribers not desiring to take* both *publications are particularly requested at once to return the back numbers of that one for which they do not wish to subscribe.*

THE

# Upper Canada Law Journal.

MAY, 1865.

## COLONIAL BISHOPS.

We had occasion in a former volume* to discuss the position of the United Church of England and Ireland in Canada, and this more particularly with reference to Provincial Synods and the appointment of Metropolitan or Diocesan Bishops. We published also the case of *Long* v. *The Bishop of Capetown*† which has an important bearing on, and was the origin of, the discussion on this subject.

The recent decision of the Judicial Committee of the Privy Council, *In re the Bishop of Natal*, has brought up kindred and even more important questions, and has caused no small stir among the members of the Church of England in the colonies; and not, indeed, without much reason.

The case of *Long* v. *The Bishop of Cape Town*, as presented for judicial investigation and determination, related to certain temporalities: the case of *The Bishop of Natal* to the right of a so-called Metropolitan to depose one of his suffragan bishops. But both cases discuss questions of great moment as to the position, jurisdiction and authority of colonial bishops.

Our limited space prevents our giving a report of this latter case, but we take from one of the leading English law periodicals a synopsis of the facts of the case.

By letters patent under the great seal, and dated in 1853, Dr. Gray was appointed Bishop of Cape Town, and Metropolitan of the Cape of Good Hope, &c., with metropolitan jurisdiction over the Bishops of Grahamstown and Natal. And it was by the same letters patent ordained that if any proceeding should be instituted against either of these two Bishops, such proceeding should originate and be carried on before the Bishop of Capetown. An appeal was given to the Archbishop of Cape Town from any decision of the Metropolitan. Fifteen days previously the appellant, Dr. Colenso, the Bishop of Natal, had been appointed to his see by letters patent declaring that he should be subject and subordinate to the see of Cape Town. And it was further ordered that the appellant should within six months take an oath of due obedience to the Bishop of Cape Town as Metropolitan. Under these letters patent the appellant took an oath professing obedience. The letters patent were not granted in pursuance of any order of Her Majesty in Council, or by virtue of any statute, although at the time they were issued the district of Natal had been erected into a distinct and separate government, with a legislative council empowered to make laws. There was also within the Cape of Good Hope a parliament with authority to make laws. In 1863 Dr. Gray, claiming to exercise jurisdiction as Metropolitan, deposed Dr. Colenso from his office as Bishop, upon certain charges of heresy and false doctrine; whereupon the latter appealed to the Queen in Council.

After elaborate arguments on both sides, the following points were established by the learned members of the Judicial Committee—

First, that the letters appointing Dr. Gray Metropolitan, and purporting to create a Metropolitan see, were invalid, inasmuch as they were issued after the establishment of an independent Legislature in the colonies referred to; or in the words of the judgment, "That after the establishment of an independent Legislature, &c,, there was no power in the Crown by virtue of its prerogative to establish a Metropolitan see or province, or to create ecclesiastical corporations whose status

* 9 U. C. L. J., 253. † *Ib.* Page 267.

rights and authority the colony could be required to recognise."

Secondly, that, assuming the letters patent to have been sufficient to confer upon Dr. Gray the *ecclesiastical office* of Metropolitan, the clauses contained in them which gave him a *coercive legal jurisdiction* were void.

Thirdly, with reference to the oath taken by Dr. Colenso, by which, it was contended, he submitted himself, by way of contract, to the jurisdiction of his Metropolitan, that even if the parties intended to enter into an agreement to create such a jurisdiction, of which, however, there was no evidence, it was not legally competent for the appellant to give, or for Dr. Gray to accept, or exercise any such jurisdiction.

Fourthly, that the letters patent had no power to confer upon the Archbishop of Canterbury the appellate jurisdiction which they purported to create; and that the decision of Dr. Gray, although he had no jurisdiction, might be set aside in the first instance by appeal to Her Majesty in Council.

The apparent result of the case is that, with the exception of the Indian Bishops, who were appointed by letters patent under the authority of the Imperial Legislature, and the Bishop of Jamaica, whose appointment by letters patent was confirmed by an act of the Colonial Legislature, the Colonial Bishops are exempt from ecclesiastical jurisdiction and legal censure, and even that the clergy who have submitted themselves to the authority of such Bishops are free to disobey them at their pleasure.

It is argued, however, by some legal writers in England, that these deductions are incorrect, and that there is still a means of bringing a contumacious or heretical bishop before a proper and a legally organised ecclesiastical tribunal, namely, a special commission to be obtained upon an application to the Crown as supreme ordinary and visitor of the Church.

But however this may be, it is eminently important that those most interested should take some immediate steps to remedy the evil that is said to exist. Good sometimes comes out of evil, and the effect may be to place the ecclesiastical and episcopal authority of the Church of England in the colonies on a more certain and useful basis.

## QUIETING TITLES.

A Bill was introduced some time since by the present Vice-Chancellor Mowat, when a member of the present Government, under the title of "An Act for Quieting Titles to Real Estate in Upper Canada."

This bill did not, however, become law, and remained in abeyance until again introduced last session by the Attorney-General. It again had to lie over, with many other bills, but will probably again be brought up next session.

The bill, as mentioned by its original introducer, is "an adaptation of laws in force in other countries to the circumstances and requirements of this section of our own Province." The Encumbered Estates Act of Ireland was, we believe, the first step in the direction of obtaining an indefeasible title to real estate. This act was found to work well, and an act with a somewhat similar object in view was, on the 29th February, 1862, entered upon the Imperial statute book (25 & 26 Vic. cap. 67).

This statute is intituled, "An Act for obtaining a Declaration of Title." From this, the proposed enactment for Upper Canada is principally, in fact almost entirely taken. It bears, however, evident marks of careful study, and a thorough knowledge of the evils intended to be obviated. Indeed nothing less could be expected from the learned gentleman who first took up the matter in this country.

If the bill becomes law, it must rest with the Judges of the Court of Chancery so to work out and interpret it that it may become *practically* useful for carrying out its objects, and not be a pretty thing on paper, a beautiful but impracticable theory. And whilst speaking on this head, it may not be out of place to say that the provisions of the act will be none the less beneficial from the fact that its compiler now occupies a position where his knowledge of, and interest in the subject will be eminently serviceable.

In February last, Mr. Mowat addressed a letter to the Attorney-General on the subject of the bill, which has found its way into print, and a copy of which has been sent us. It may be interesting to many to hear the views of Mr. Mowat with reference to the evils which the bill was designed to meet, and of the method by which the bill proposes to remove them.

The following is a copy of the letter referred to:

"I am very glad to know that the Bill for Quieting Titles is to be carried through Parliament this Session as a Government measure. As I have taken great interest in the subject to which this Bill relates, and have given to it considerable attention, it has occurred to me that I may perhaps facilitate your work a little by stating my view of the evils which the Bill was designed to meet, and of the method by which the Bill proposes to remove them.

When I first introduced the Bill you were good enough to express your approval of its principle and object, and to go over its clauses with me very carefully and to suggest to some of them amendments which I had great pleasure in adopting.

The Bill as it now stands has thus had the benefit of a careful revision by yourself. For the original preparation of the Bill I frankly confess that I am entitled to no particular credit. My professional practice had called my attention to the great and growing evil of the insecurity of our Titles, and my reading had brought to my knowledge the remedy first adopted in Ireland, afterwards acted upon in Australia, New Zealand, and elsewhere, and lately applied to England itself. What I have done is the draftsman's work of adapting laws already in force in other countries to the circumstances and requirements of this section of our own Province.

The leading objects of the Bill are to give greater certainty to Titles; to facilitate the proof of them; to expedite transfers; and generally to render dealing with real property more simple and less expensive. Everybody is interested in these important objects, for everybody either owns property now, or hopes to do so some day.

The insecurity of Titles, which it is the purpose of the Bill to remove, has often been the occasion of the greatest possible hardship and suffering to individuals and families; and facility of transferring real estate, which it is the intention of the Bill to promote, is of the greatest importance to a young country, like Canada.

The method by which the Bill proposes to accomplish its design is by rendering Titles indefeasible whenever they have been submitted with this special object to the ordeal of a judicial investigation and their validity has in this way been ascertained. This investigation is not to be compulsory on owners, but the proposal is that an owner shall have the right to have the investigation made if he chooses, and though there may be no adverse claimant. On his establishing his Title, after due inquiry and every precaution by the Court against error or fraud, it is proposed that the owner shall receive a Certificate of Title; and that such Certificate shall operate as a new starting point in his title, and shall be conclusive at Law and in Equity against all the world that at the time mentioned in the Certificate the land belonged to the person it names. Thenceforward when the owner sells or mortgages, an intending purchaser or mortgagee will only have to search for conveyances or incumbrances subsequent to the Certificate—the work of perhaps five minutes or less.

As the Law stands now an owner may have an undisputed and indisputable Title; it may be easy for him to-day to prove every deed and every fact on which his Title depends; but a dozen years hence the case may be quiet different. The proof may then be difficult, expensive and pehaps impossible; witnesses whose testimony he needs may be dead; or if alive, it may be impossible to find them; or if found, they may be where the process of our Courts cannot reach them, and where therefore their evidence cannot be compelled. Or if these difficulties do not arise, others may. In a dozen years witnesses may forget important facts; or some of the papers on which the Title depends, may be mislaid or lost, and there may be the greatest possible trouble in tracing them, or proving by satisfactory evidence their loss and their contents. The Bill proposes to give to every owner the right, if he chooses, of producing his proofs now; and if they are clear and satisfactory, of being relieved forever afterwards from the necessity of producing them.

When an owner has occasion to prove his Title at law, this only gives him the opportunity of showing the legal title. An action at law seldom touches the question of the equitable Title, or of equitable interests in the property; and whatever such an action decides is binding on the parties to the suit only, and affects no one else. The evidence must be forthcoming, and may have to be repeated in every suit with everyone who at any future time sets up a claim to the property.

Then again many of the flaws on which a Title is defeated are such as, if known in time, could be easily and cheaply remedied; but are beyond remedy when the property becomes valuable enough to tempt the cupidity of those who are entitled to take advantage of the defects that are discovered; or the original party to the transaction may then be dead and his heirs may be minors or needy, and for these or other reasons unable or unwilling to correct or overlook the mistakes or omissions which render the title defective.

All sorts of questions have to be considered in looking into a title prior to making a purchase or

accepting a mortgage. Are the deeds and wills through which the title is traced, genuine instruments? or have any of them been forged or tampered with? Were they all duly executed? Have all the forms required by the Statute been observed in the registration of them? Were all the requirements of the Acts affecting married women complied with? Did every testator possess the requisite mental capacity at the time of his will? Was it read over to him? Did the witnesses subscribe their names in the presence of one another? Even in regard to these ordinary questions that occur on almost every title, examples of misinformation and misfortune have not been wanting.

But sometimes much more difficult questions than these have to be determined, as to the construction of wills. Occasionally difficulties of this class entirely escape attention when a Title is investigated, and at other times a wrong conclusion is come to in reference to them.

Then questions of identity and questions relating to possible claims for dower have sometimes been overlooked by former purchasers, and involve considerable perplexity in subsequent investigations.

Again, persons dealt with as legitimate, sometimes turn out not to have been legitimate; or a person who has conveyed as eldest son and heir under the old law, is subsequently ascertained not to have been eldest son and heir. So persons supposed to be all the children and co-heirs under the new law, may only be some of the children; persons may not be dead, who were supposed to be dead; or persons may not have been born at the dates supposed, and on which important rights depend; persons may have been aliens who were supposed to be British subjects, or may have been British subjects who were supposed to be aliens; and persons may have been absent from the country when the Statutes of Limitations were supposed to have commenced running against them, or may have been in the Province before the Statutes were supposed to have begun their operation in barring their rights.

There are even some causes of difficulty, delay and expense in the case of Canadian Titles, which do not exist to the same extent in England.

Thus we have not hitherto had any complete system for the registration of births, deaths and marriages, and the want of any has created much inconvenience.

Again, our population is less stationary than that of Great Britain, or of the old countries of Europe. A much smaller proportion of our people, than is the case in an old country, remain permanently in one place; and a much larger proportion, after being concerned in the ownership of land, or being witnesses to transactions affecting the ownership, leave the part of the country where they were known at the time, and perhaps leave the country altogether. Native Canadians, or those who have lived for a time here, are to be found in British Columbia, Australia, New Zealand, and probably every state of the American Republic. The difficulty from this cause alone of tracing witnesses or former owners and of ascertaining and of proving the death of heirs and devisees, is sometimes found to be very serious.

Then again, Canadian Titles have, in many instances, to be traced through persons residing in Great Britain; through deeds and wills executed there; and heirs who were born there, and who married and died there.

So from time to time it happens that births, deaths and marriages which have taken place in the various State of the American Republic, or in the other British Provinces on this Continent, or in Australia, or in the countries of Continental Europe, form essential links in a Title. It is obvious that the difficulty of searching for such facts, and then of establishing them, must sometimes be very great, even when the events are comparatively recent; but when they occurred many years ago, the difficulty may amount to an impossibility. Every Title depending on such events, becomes less safe with every year that passes; and as the law stands now, no reasonable caution and no moderate expense can make such a Title entirely secure.

Again, in this country large blocks of farming land often depend on a single Title; or a farm lot is, in the formation of our cities, towns, and villages, divided into building lots; and a flaw in the Title of one of those who owned the property before the division of it, destroys the Title not of one person only or of one family only, but of many persons and many families.

It often happens too that the original Title is in such cases less carefully examined than if there had been no subdivision, and one person was buying all. Parties appear to think that a weak Title acquires strength by the number of persons who hold by it; or everybody assumes that his neighbour has examined the Title and found it correct, and he trusts to this supposed investigation in order to avoid the expense of an independent investigation of his own. Were there an easy method for obtaining an indefeasible Title, no one would think of sub-dividing his land without first obtaining a Certificate of Title.

Our Registry law has, beyond all controversey, been of immense advantage to the country; and

yet in regard to any of the questions I have spoken of, it cannot be said to afford any protection whatever; we need something to supplement its provisions before our Titles can have the reliability which it is very desirable they should possess. The Registry law in fact provides for but one source of danger to a purchaser, namely unknown conveyances affecting the property. It affords little or no aid in ascertaining the validity of conveyances, the proper construction of deeds and wills, or any events affecting Title otherwise than by instruments; or in supplying the future proof of such events. These things may be of greater moment to an intending purchaser, than the possibility of there being some deeds affecting the property, of which, but for the Registry law, he would not have known. In fact our people have been in the habit of trusting too much to the Registry, and have in consequence neglected to preserve their deeds as carefully as prudence required. The Registry law has not hitherto required a memorial of the whole deed to be registered; and the deed may consequently have contained conditions, provisions and trusts, of which the memorial gives no information. All that the Statute requires the memorial to state is, the date of the deed, the names of the parties and of the witnesses, and the description of the property. Even the estate or interest conveyed, need not be mentioned. There may therefore be an interest under a registered deed which does not appear in the memorial; and a man may have an interest, as (for example) mortgagor, remainder man, reversioner, or cestui qui trust, without any intimation of this being given by memorial. Mortgages have often been registered as absolute conveyances. If the new Registry Law which the Government has introduced should prevent this method of registering instruments for the future, the change will have no effect on past transactions.

It is a further serious inconvenience connected with our existing system, that if a purchase is effected or a loan granted after an investigation which satisfies the Solicitor employed that the Title is good, the whole investigation has to be gone over again upon every fresh transaction in reference to the property; and a title that was satisfactory to one lawyer may not be satisfactory to another; as among lawyers there are all degrees of professional skill and knowledge, and all degrees of prudence and caution, as well as of experience. Besides, the ablest and most cautious lawyer may occasionally make a slip or overlook a defect which an inferior man may happen to detect. Sometimes, therefore, one solicitor finds it his duty to reject a Title which another solicitor has examined and passed; and this is the case not only in Canada, but in England also, where conveyancing is a distinct branch of professional practice, and has received a degree of careful attention which it is not possible for general practitioners in Canada to give to it.

The desireableness of such a measure as you have brought in, and of there being no delay in passing it, further appears from the obvious fact that every year our Titles are becoming more and more complicated by sales, mortgages, wills, and settlements, as well as by deaths, marriages, births, and all other events affecting Titles. Every instrument that is executed, every transaction that takes place, every event that affects the ownership, increases the evil; for the more complicated a Title is, the more numerous the links in the chain are, the greater is the chance of a mistake being made in advising upon it, the greater the chance of there being some flaw which it may be difficult or impossible at the time to detect, and the greater the chance of the proofs necessary to establish the Title being lost, or for some reason not obtainable when needed. Even the mere lapse of time, until it is long enough to give a title by possession, but serves to enhance the danger, through the death of witnesses, or their forgetfulness or mis-recollection of facts, and other causes. With time, property is increasing in value; the importance of the Title being unimpeachable is augumenting; and yet with time, until the period of prescription is actually reached, come increased complication and increased danger.

Property more frequently changes hands in cities and towns than in the country; and at present the evils which the Bill is designed to remove, are greater in the former than in the latter. For the same reason they are greater in those parts of the country which have been long settled, than in those in which the lands have but recently been patented. Indeed some conveyancers of great experience have expressed the opinion that, unless a remedy is found, there will not in a few years be many marketable Titles in this part of the country. The evil is certainly increasing and must increase everywhere, until our Titles become as complicated, and the investigation of them becomes as expensive, as in England itself. There the investigation usually occupies months; and it appears from our law books that ten years and even more have sometimes been spent in making out a Title. Occasionally also the expense has nearly equalled the purchase money; one instance is mentioned by Lord St. Leonards in which a vendor gave the property to a purchaser for nothing, on condition

of the purchaser's relieving him from one part of the expenses of the investigation, namely that of furnishing copies of the Title deeds. On the other hand, the earlier in a country's history that some system is adopted for giving certainty to Titles, the easier is the task, and the more effectual are the means which it is practicable to adopt.

The truth is, that under the English system (which is also ours) there are, in a larger number of cases than I would like to designate, no means by which any one, when he buys a piece of property unless he buys from the Crown, can be absolutely certain that he is getting a good Title Even if his grantor was the patentee he may not be perfectly safe, for there may have been a prior patent of the same lot to another person, or the patent to the grantor may have been issued through some fraud or mistake which, on just grounds, may invalidate it. So a sale in Chancery is only enforced if the Title on investigation appears good; but even this investigation, as the law now stands, does not give perfect security, and in England there are in the books instances of a Title obtained under a Chancery sale, being afterwards successfully impeached from some unexpected quarter.

I think you will agree with me that it is especially important with us that means should be adopted to give the greatest practicable certainty and simplicity to our Titles, because emigrants and others are apt to take on trust the validity of the Title of the apparent owner of the property, especially if he appear to be a respectable man, and are unwilling or perhaps unable to bear the expense of obtaining competent professional advice in looking into the Title for them; and it is a cruel hardship that a man of this class, or of any class, after buying a lot, entering into possession, perhaps spending all his means and the labour of himself and his family for years in improving it, should be suddenly deprived of his property and perhaps the labour and acquisitions of a life-time, through some defect in his Title of which he had no suspicion. Yet instances of this kind are unfortunately within the knowledge of almost every lawyer.

It is hardly a less cruel hardship that the law should be in such a condition that a man who lends his money on a mortgage under professional advice, is liable to lose his money afterwards from some latent defect in the title. I have heard of one lender who in this way lost £11,000 in one transaction. Even Building Societies and Loan Companies occasionally meet with like losses, though for various reasons they are more frequently heard of in the case of private lenders.

But the advantage of our Titles being certain, is very far from being confined to the particular cases in which innocent persons might otherwise suffer. The country generally would benefit by its being known that our Titles were perfectly safe and simple, or could be made so. Such a state of the law would tend to encourage both settlers and those who have money to invest, while any doubt or fear about our Titles discourages both.

The saving of time on all subsequent transactions in relation to property after a Certificate is obtained, would not be the least valuable result of the system which the Bill proposes to introduce. Under the existing system the investigation sometimes takes weeks, sometimes months, and occasionally (as I know from personal experience) even years; and the transaction is sometimes broken off in consequence of the delay, or is only carried out when the owner's purpose in selling or mortgaging can no longer be answered. I have known some painful illustrations of these results, and probably no lawyer in large practice but has done so too.

Under the proposed measure, if an owner has a Certificate of Title, he may complete a sale or mortgage in two hours after bargaining for it. The preparation of the deed or mortgage seldom occupies much time; and the search at the Registry office for mortgages or conveyances subsequent to the certificate would be the work of but a few minutes.

The existing system exposes parties in taking or acting on a Title to the danger of the Title turning out to be bad through some unperceived flaw or some unknown fact, to the danger of losing the evidence of a Title that is really good; to delay in the investigation when expedition is an object; and to constantly increasing expense in the investigation and proofs. The Bill proposes by a short, inexpensive and just method to remove these evils. I say a just method, for I do not know that any one will think it unjust or objectionable that latent claims will be shut out by the Certificate. We already by our Registry law recognize the propriety of such a provision; and so great and undeniable are the advantages the country derives from the law, that the tendency is to extend and not to restrict it. Under its operation latent claims are excluded without any of the precautions which the Bill proposes that the Court should observe before a certificate is granted; and I think there can be no reasonable doubt that when a person is in possession of property as apparent owner, when his deeds and papers appear, on a rigid examination of them, to establish clearly that he is owner, when the

Registry office gives no intimation of an adverse claimant, when none can be discovered in answer to public advertisements, it is but just that the law should protect the person who purchases from such an owner, rather than protect the interest of some unknown person who afterwards sets up a claim of which he had taken no steps to give others warning.

The principle of the Act exists in Lower Canada where, I believe, Sheriff's sales give an indefeasible Title. I have been informed that a Sheriff's deed is in consequence regarded in Lower Canada as the best, and indeed only entirely safe Title that a man can have.

The machinery which the Bill adopts, is, in principle, that which was adopted in the Statutes regarding Irish Incumbered Estates, and which was found to work so beneficially in Ireland that it was afterwards made to apply there to all lands, instead of being confined as it was in the first instance to Incumbered Estates. It has also, with the cordial approbation of English Law Reformers of all parties, been lately extended to England; though the opposition of the Solicitors has prevented much use being yet made of it there. In this Province the interest of the legal profession is not against the proposed measure. Conveyancing forms a smaller part of of professional business than in England, and the incidental advantages of the proposed measure will more than compensate solicitors for their loss of profit, through the general simplification of Titles. Had it been otherwise, I am bound to express my conviction that Canadian lawyers would have been found too liberal and patriotic to prefer their own interest to an important reform in the laws of their country.

The English law as to the sale of goods in *market overt*, is an illustration of the principle on which our Registry law and the Bill in question alike proceed; and for upwards of three hundred years a like doctrine was allowed to prevail to a considerable extent in regard to lands also, by the operation of fines and recoveries. Lord Coke said that 'the law had ordained the Court of Common Pleas as a *market overt* for assurances of land by fine; so that he who shall be assured of his land not only against the seller but against all strangers, it were good for him to pass it in this *market overt* by fine." But the change of manners gradually destroyed the value of the precautions which originally were a sufficient protection to persons who were no parties to the proceeding, and ultimately rendered necessary the abolition of fines and recoveries. For it will be remembered that there was no investigation of the Title by the Court in such cases; all that was required was, that the person 'who levied the fine' should be in possession of a freehold by right or by wrong, and that no adverse claim should be duly made; and the only notice given was the rehearsal of a fictitious formula couched in technical and obsolete language to an uninterested audience in the Court of Common Pleas at Westminster. The fine bound all persons who were not under disability, even though they were entirely ignorant of the proceedings.

To prevent possible injustice from the working of the new system, the Bill provides all reasonable precautions. The Court, before declaring a Title good, is to make, by itself or a competent officer acting under its own supervision, a thorough examination of the Title deeds and evidences of Title in the possession or power of the party; a thorough search at the Registry office is also required; and copies of all memorials are to be produced that relate to deeds of which the originals cannot be found. An affidavit is required from the owner that he knows of no adverse claim; and a certificate from his solicitor or counsel that he has examined the Title and conferred with the owner, and believes the affidavit true and the Title good. There will thus be the best possible security that nothing is kept back. Notice of the application for a Certificate is further proposed to be given, not only to any one having an adverse claim, but to any one whom the Judge thinks it prudent to notify. In addition to all these precautions, notice is to be published in the *Canada Gazette*, and in any other newspapers the Court sees fit, in order that if there is any claimant whose Title neither appears on the deeds nor in the Registry, nor is known to the claimant or his professional adviser, such claimant may still, if possible, receive an intimation of what is going on, and have an opportunity of establishing his right.

But if any one has a claim which is not shown by the deeds or the Registry, and which the astuteness of the Court and its officers cannot detect, and which even advertisements cannot bring to light, the Bill assumes that the public interests require that such a claim should thenceforward be excluded as against honest purchasers or their representatives.

If, notwithstanding all the precautions referred to, a Certificate of Title should happen to be obtained through fraud or false statements on the part of a petitioner, the Certificate is declared (§47) to be void in such a case as respects the petitioner, and to be valid only in favor of a purchaser for value who had no notice of the fraud or falsehood. The chance of the Act working injustice in any possible case, is thus reduced.

to a minimum; while on the other hand it is especially declared that the Act is to be so construed and 'carried out as to facilitate as much as possible the obtaining of indefeasible Titles by the owners of Estates in Lands, through the simplest machinery, at the smallest expense, and in the shortest time, consistent with reasonable prudence in reference to the rights and claims of other persons.'

The machinery provided is so simple that I do not see that, with the exception of the disbursements for publishing and serving notices, the expense of a judicial investigation need be much greater than that of one thorough investigation out of Court on a sale or mortgage of the property. It will certainly be less than two of such investigations; and the judicial investigation will have the immense advantage of being made once for all, instead of having to be repeated at every new sale or mortgage of the property; and will have the further advantage of being certain and conclusive, instead of being forever open to question. I am satisfied that a measure which secures these advantages will prove a great boon to the country."

## SELECTIONS.

### REPORT OF THE STANDING COMMITTEE OF JURISPRUDENCE AND AMENDMENT OF THE LAW, ON THE LAW OF APPEAL IN CRIMINAL CASES.*

In February of last year a paper was read before this Department by Mr. G. Harry Palmer, in which he brought forward some "suggestions for the amendment of the law of appeal in criminal cases." This paper was referred to the Standing Committee, and the result of their deliberations is embodied in the series of resolutions which they submit to the Department this evening. These resolutions were only arrived at after long and careful consideration and discussion, and it will be as well to state the reasons which have led to their adoption in committee.

In his paper on the subject, Mr. Palmer based his suggestions for a change in the present system on this proposition:—That a criminal "is entitled by the mutual rights and obligations of citizenship, upon showing reasonable cause for being dissatisfied with the decision of one tribunal, to have his defence laid before another." Viewed as an abstract principle of criminal jurisprudence, there can scarcely be any difference of opinion as to the soundness and justice of this proposition: and the committee quite concur in the position taken by Mr. Palmer, that the total denial to our criminals of the right claimed by it is a grave defect in our system of criminal procedure; that the attempt to make the royal prerogative of mercy supply this defect has failed to remedy the evils to which it gives rise; and that these evils are such as demand some legislative attempt at their removal.

The deficiencies in the existing system are sufficiently obvious. After trial and conviction, circumstances may, and, as experience shows, occasionally do arise which cause a reasonable doubt whether the conviction has been a just one; or whether if these circumstances had been exposed to the court at the trial the conviction would have been obtained. For instance, new facts may have come out after the trial, contradicting or discrediting the evidence which procured the conviction. Here there would be just ground for asking that the decision of the convicting tribunal should be replaced by another decision in which these new facts should be produced, and allowed to exercise their due influence upon the minds of the jury or judges as to the fact. At present the only substitute for this application is an appeal "*ad misericordiam regis*," through one of the Secretaries of State* who exercises in an informal and extra-judicial way, the functions of a court for reviewing the facts of a criminal case after conviction.† The ordinary duties of the Home Secretary are necessarily incompatible with the onerous duty of an appellate judge. He is compelled by his position in the State to examine every case that is laid before him in private, upon the *ex parte* statements of persons in no way responsible for what they say. His enquiries are conducted not only secretly, but without any rules of procedure. He has at his command none of that machinery for eliciting and testing the value of evidence which is afforded by a public trial; and yet he is bound to decide, not merely whether there is ground for a new trial, but upon the facts and merits of the whole case, whether the verdict already given should be quashed, or the sentence varied. If in the face of all these difficulties he has been able to form a conscientious opinion that the conviction should be reversed, he cannot reverse it, but must apply the prerogative of mercy to pardon an accused for a crime of which he judges him to be not guilty.

It is admitted on all hands that this anomalous method of supervision over the verdicts of juries in criminal cases, exercised as it is in such an objectionable manner, should be replaced by some court of law charged with the duty of doing openly and judicially, what the Home Secretary now does in secret. The only question upon which there seems to be any material difference of opinion is as to the

* Read at a Meeting of the Department, Monday, February 27, 1865.

* As a matter of custom this application is always made to the Secretary of State for the Home Department.

† It is scarcely necessary to observe that questions of law that arise at a criminal trial are considered and decided by the court established by the Act 11 & 12 Vict., c. 18, for crown cases reserved.

nature and constitution of this court. By some it is maintained that the existing defects would be effectually removed by merely granting a right to move for a new trial in criminal as well as in civil cases; whilst others maintain that the most efficient remedy would be found in the creation of a court of appeal and review, which should hear and decide the appeal, whether involving questions of law or fact, without a jury.

The main objection to every scheme for the creation of a mere tribunal of review is the fact that it interferes with the constitutional privilege of trial by jury; and this is the strongest argument in favour of introducing the principle of new trials. When a person convicted of a criminal offence has made it appear, after conviction, that there is evidence now available which, if it had been before the convicting jury, would have altered the complexion of the case against him, he is clearly entitled, if he prefers it, to have this new evidence submitted, not to a court, but to a jury. For this reason the Committee are of opinion that the concession of any right of appeal should include the right of re-trial by jury. The practical objections, however, to the introduction in criminal cases of an unqualified system of new trial, similar to that in civil cases, seem to the committee to be very strong. It may be, as Mr. Palmer says, that even if no restraint were put upon an application for a rule *nisi*, the applications would not be so many as to add materially to the work of the judges. But with no experience to confirm this view, Parliament would not be acting with ordinary caution if it did not provide against the possibility of groundless appeals. For this reason there can be little doubt that the Legislature of to-day would not be at all more ready than that of 1844 to pass a measure so comprehensive and sweeping as that brought in last session by Sir Fitzroy Kelly. That Bill proposed to constitute the court for crown cases reserved, a court of criminal appeal. Subject only to the formal certificate of a barrister that there was reasonable ground for appeal, it made it matter of right that any one convicted of treason or felony should be allowed to appeal to the superior courts or the court of criminal Appeal for a rule to show cause why a new trial should not be granted, or a verdict of not guilty entered in lieu thereof; or why the judgment should not be arrested or reversed. If the rule *nisi* were granted, it was to be argued before the court of criminal appeal, who were to have full power, not only to grant a new trial, but to order a verdict of not guilty to be entered, or that the judgment should be arrested or reversed, or to make such order as justice shall require.

It is the opinion of the Committee that a sufficient guarantee against the possibility of groundless and dilatory applications for new trials by wealthy criminals would not be afforded by the certificate of a barrister that "there is cause for an appeal." Few barristers would undertake the responsibility of saying that there was no ground for a review upon reading a strong *ex parte* statement in favour of an application for a new trial. And it is submitted that as fees would necessarily be given, such a rule would place the whole profession in a false position. On the other hand, the only effectual alternative would be to give the presiding judge the discretion of deciding whether there was any reasonable ground for an application for a new trial. Against this expedient will probably be urged the statement referred to by Mr. Palmer in his paper, that the discretion vested in the judges as to reserving points of law on criminal trials has been exercised in an unsatisfactory manner. It is not necessary to consider in this report how far this objection is well founded, for it cannot be extended to the case now under discussion. The points of law reserved are invariably technical, and never affect the substantial issue of guilt or innocence, as is always the case with questions of fact. A judge would naturally lean to an adverse decision, where he was asked to reserve the question, whether a thief acquitted on indictment for larceny, as bailee, could be convicted for larceny at common law. But where he was asked to allow an application for a new trial, on the ground that there were facts to show that the offence had never been committed at all, it may be safely assumed that the application would be acceded to, if there were any just grounds for it. The Committee, therefore, have come to the conclusion, that, at all events as a first step, application for a review or for a new trial, in criminal cases, should only be allowed on the certificate of the presiding judge that the case is one for such an application. For the reasons already stated, they consider it of importance that the right of being re-tried before a jury should not be withdrawn. At the same time they are quite sensible of the substantial benefits which would be gained, if, on the grant of a new trial, the new trial were taken without a jury before the court which had granted the application. This benefit would be practically attained, in a great measure, if the court were made competent to try questions of fact, and the option were given to the accused of having the case so tried, or having it sent down to a jury. The majority of those who obtained a new trial, would elect with confidence to have the case decided by a tribunal, which had already gone so far towards reversing the decision of a jury; and thus, whilst the constitutional right of trial by jury would be untouched, the practical advantages of a central court of review would be secured.

These, then, in the opinion of the Committee, are the chief objects which should be accomplished by any scheme for amending our law of criminal appeal:—

1. That it should afford to those convicted of any criminal offence, the means of bringing under judicial consideration any fair grounds for submitting the charge to a second investigation.

2. That the public should be carefully guarded against the possibility of the right being exercised in such a way as to defeat or delay the execution of criminal justice.

3. That all persons convicted of any criminal offence, should be entitled, if they prefer it, to have any second investigation of the facts constituting the charge against them taken before a jury.

These objects, the Committee believe, would be secured by a system of appeal, framed in accordance with the following resolutions:—

1. That the present system of revising sentences of the courts, by means of the Home Office, is unsatisfactory.

2. That any person convicted of treason, felony, or misdemeanor, should be entitled to apply for a new trial, and such application should be made by motion before a court composed of not less than three judges of the superior courts, and that the said courts should sit at intervals of not less than one month throughout the year; but that no such application should be made, except upon the certificate of the judge who shall have presided at the trial, that the case is one for such an application.

3. That if an application for a new trial be granted, the accused should have the option of being tried before the court which shall have granted the new trial, or before a jury, as in the case of new trials in civil cases.

4. That if the accused elect to be tried by the court which has granted the new trial, that court should have the power of summoning and examining witnesses on oath, and all the power, jurisdiction, and authority exercised by the court before which the accused was originally tried.

## UPPER CANADA REPORTS.

### QUEEN'S BENCH.

(*Reported by* C. Robinson, Esq., Q.C., *Reporter to the Court.*)

### Small v. Eccles.

*Rule moved on affidavit filed in Chambers—Discovery and production of documents.*

Where a rule *nisi* in full court did not disclose the fact that it had been obtained on an affidavit previously used in Chambers to obtain a summons for the same purpose, and the leave of the court to take such affidavit off the files was not shewn: *Held*, irregular, and the rule was discharged with costs.

Plaintiff, as judgment creditor of H. & Co., had obtained a writ calling on defendant as garnishee to shew cause why he should not pay to the plaintiff a debt which he owed them, the allegation being that he had sold certain goods of H. & Co. under a chattel mortgage which they had given him, and received more than the mortgage money.

*Held*, that upon the affidavits set out below enough was stated to call upon defendant to shew what books he had in his possession relating to the matters in dispute.

The plaintiff also swore that he believed the defendant had received certain notes and securities in connexion with the sale, some of which remained in his possession. *Held*, insufficient, the documents asked for not being identified or shewn to exist.

If defendant admits the possession of certain documents, but states positively, or even says he is advised and believes, that they will not support the plaintiff's case, *Semble*, that that the production will not be ordered.*

[Q. B. T. T., 1863.]

In Easter Term, C. S. Patterson, for the plaintiff, obtained a rule calling upon the defendant to shew cause why he should not answer on affidavit, within such time as the court should order, stating what documents he had in his possession or power relating to the matters in dispute in this cause, or what he knew as to the custody they or any or either of them were in, and whether he objected (and if so, on what grounds) to the production of such as were in his possession or power, on grounds disclosed in the affidavits filed.

The plaintiff's affidavit stated that he was plaintiff in a cause wherein Henry John Haycraft, and two others, (naming them,) were defendants, and the said Eccles was garnishee: that proceedings being taken in that cause by the plaintiff for the attachment of a debt alleged by the plaintiff to be due by Eccles to two of the said defendants, Eccles denied that he owed the said debt, and thereupon by a judge's order, dated the 25th of July 1862, a writ was issued in this cause, calling upon Eccles to shew cause why the plaintiff should not have execution against him for such alleged debt: that on the 10th of November, 1862, an order was made, referring the matters in difference to an arbitrator: that a meeting was had before the arbitrator, on the 6th of March, 1863, attended by the plaintiff and Eccles and their counsel, and was adjourned: that the plaintiff sought to establish against said Eccles a debt for money had and received to the use of the said two defendants, the said Eccles having held a chattel mortgage from them to secure to him the payment of a debt alleged to be due from them to said Eccles, and to secure him from loss as endorser of a bill of exchange, under which said Eccles sold the goods mortgaged, and realised, as plaintiff believed, a much larger sum than was payable to him under the said mortgage, and that such sum was in the hands of said Eccles, which was the debt in question: that the said sale was conducted by one Houghton, an auctioneer, who, as the plaintiff had been informed by him and by said Eccles, rendered an account of such sale and the proceeds to Eccles, and which account remained in his possession: that Houghton had told the plaintiff he could not give him a copy of the account, as the books containing the same were lost: that said Eccles obtained possession of the account-books and other books used in the business of Haycraft, Small & Addison, and which books had been used in continuing the same business by C. S. Small, the younger, and Robert Addison, (the other partners of Haycraft,) up to the time when said Eccles took possession of the goods under the mortgage: that the plaintiff had seen two of the said books, a ledger and another book, in defendant's possession, and be-

* As this case is frequently referred to in practice, but, although prepared for the regular reports, has not yet appeared in them, we publish it for the benefit of our readers; it will hereafter appear in the next number of Mr. Robinson's Practice Reports.—Eds. L. J.

lieved that said Eccles had in his possession other books and documents relating to the business and matters aforesaid: that the plaintiff believed said Eccles received, besides the proceeds of the sale, and as part thereof, promissory notes and other securities from the purchasers at the sale, and from other customers of the execution debtors, as well as notes which had been given to the execution debtors by customers and others, and that he had received large sums of money in payment of such notes, and that some of such notes remained in his possession: that the plaintiff was advised and believed that it was material and necessary for him, in order to support his claim, to have such account-books, notes and securities produced to him, and that he would derive material support and advantage from their production.

In Trinity Term, *Gwynne*, Q. C., shewed cause. He filed an affidavit of Mr. Eccles, stating that the plaintiff's affidavit, on which the rule *nisi* issued, was filed in Chambers in March last, and used in support of a summons granted in the very same terms as the present rule, and which summons was heard and discharged by Hagarty, J., though the order was not drawn up: that deponent appeared at the arbitration and offered to be sworn as a witness, and to detail all matters and circumstances connected with the subject of this suit, but the plaintiff would not allow deponent to be sworn: that long before this proceeding was commenced deponent furnished to the plaintiff a full statement of all transactions between the firm of Small & Addison and himself, by which it appeared that deponent was not indebted to them, and deponent then and frequently afterwards offered to go through the whole matter with the plaintiff, and to produce satisfactory vouchers for deponent's discharge, which offer the plaintiff declined: that deponent had not and never had in his possession or power any document or paper relating to the matters in dispute in this cause which would be evidence for the plaintiff in support of his pretended claim, but such documents as deponent had, related principally to his discharge: that deponent had some books of account which did belong to the firm of Small & Addison, and which came to his possession under circumstances which he was willing to disclose and explain if he was examined as a witness in this cause, but the said books did not contain any thing which could be evidence for the plaintiff.

*C. S. Patterson*, in support of the rule, cited *Scott* v. *Walker*, 2 E. & B. 555; *Forshaw* v. *Lewis*, 10 Ex. 712.

*Gwynne*, Q. C., contra, cited *Thompson* v. *Robson*, 2 H. & N. 412; S. C., 26 L. J. Ex. 367.

Draper, C. J., delivered the judgment of the court.

The plaintiff comes before us as the judgment creditor of Henry John Haycraft, Charles C. Small, the younger, and Robert Addison, and he has obtained and served upon the defendant an attaching order, under the 288th section of the C. L. P. Act, (Consol. Stats. U. C., ch. 22.) The defendant as garnishee has, upon being called upon to shew cause why he should not be ordered to pay over, denied his liability; and an order has been made that the plaintiff may proceed against him by writ calling upon him to shew cause why there should not be execution against him for the alleged debt. It is to be assumed, though it is not distinctly stated, that this writ has been served. The statute directs that the proceedings shall be the same, or as nearly as may be, as upon a writ of revivor. What proceedings were taken on this writ in the nature of pleadings does not appear. The order for the writ was made on the 25th of July last, and on the 10th of December following the matters in difference were referred to an arbitrator, who, on the 6th of March, 1863, was attended by the parties and their counsel, but the plaintiff not being prepared with the necessary evidence the reference was adjourned. On the 20th of May last, in Easter Term, a rule issued calling on the defendant to answer upon affidavit what documents he had in his possession or power relating to the matters in dispute in this cause, or what he knows as to the custody they or any of them are in, and whether he objects, and if so on what grounds, to the production of such as are in his possession or power.

The plaintiff states in his affidavit that he seeks to establish that defendant is indebted for money had and received to the use of C. C. Small, junior, and Robert Addison, the defendant having held a chattel mortgage from them to secure payment of a debt due by the firm to him, and to protect him against loss as endorser or acceptor of a bill for their accommodation. This statement as to the chattel mortgage the defendant does not notice in his affidavit. The plaintiff further states that under this mortgage the defendant sold the goods and realized therefrom, as plaintiff is informed and verily believes, more than any sum payable to him under the terms of the mortgage, and that it is the overplus which is the debt in question in the cause. The defendant passes by all this allegation, by answering thus:—that before the proceeding was commenced he furnished the plaintiff a full statement of all transactions between the said firm and himself, by which it appeared that he was not indebted to the firm. The plaintiff further states that this sale of the goods was conducted by an auctioneer, who rendered an account thereof and of the proceeds to the defendant, and that owing to the alleged loss of the auctioneer's books, the plaintiff cannot obtain a copy of this account. The defendant in his affidavit takes no notice of the plaintiff's allegations in respect of this account.

As to this document—the auctioneer's account—it appears to us certainly that it may, and indeed if it be what is represented, must contain matter material to the question whether the defendant is indebted to the firm of Small & Addison for money had and received, and that it is in the possession of the defendant. Discovery of this document is not therefore wanted, but an inspection of the same, an application for which should be made under the 197th section of the C. L. P. Act. The plaintiff does not state any application to the defendant for an inspection or copy of this account.

But having thus established, *primâ facie* at least, that the defendant is in possession of a document to the production of which he is entitled for the purpose of discovery or other-

wise, the plaintiff, under sec. 189, is entitled to ask what documents the defendant has in his possession or power relating to the matters in dispute, and to have the defendant's answer (on affidavit) to the enquiry. But an order to produce or to inspect is not the object of the application. When the defendant has answered on affidavit as to what documents he has, &c., and admits that he has any, the court may make such *further* order as is just. If a defendant, admitting the possession of certain documents, denies that they will sustain the plaintiff's case, or even says that he is advised and believes they will not do so, it seems production will not be ordered. See *Peile* v. *Stoddart*, 1 McN. & G. 192; *Reynell* v. *Sprye*, 15 Jur. 1046.

The case of *Scott* v. *Walker*, 2 E. & B. 555, was on an application to inspect. The case of *Thompson* v. *Robson*, 2 H. & N. 412, has more bearing. As to the books of Small & Addison, they are not open to the objection that their existence is not shewn, though it is at least very doubtful whether they would contain evidence against the defendant on this claim. They may do so, but the affidavit of the plaintiff does not assert it, at least positively. Enough however is, we think, stated with regard to them to call upon defendant to answer what books he has in his possession relative to the matters in dispute. Upon his affidavit it will be seen whether the court should make further order; but as to notes and other securities, the affidavit is no stronger than in *Thompson* v. *Robson*, where Bramwell, B., says, "It is necessary to identify the particular document asked for." This affidavit does not assert the existence of any notes or securities, but only that the plaintiff is informed and believes there are such. Pollock, C. B., says: "We cannot grant a rule calling on defendants to give a list of documents, which is a mere attempt to fish out evidence to make a case."

There is, however, an objection taken, and the fact is shewn in the first paragraph of the defendant's affidavit. The only affidavit produced on moving this rule *nisi* is an affidavit of the plaintiff, which was filed and used in Chambers for the purpose of obtaining a summons similar to the rule now before us. How the plaintiff got this affidavit off the files on which it was placed in Chambers and produced it on moving this rule is not shewn, or rather it is not shewn that the court permitted it to be done. The rule itself does not disclose that it is drawn upon an affidavit which has been already used, and such has been the practice in our courts, and it is founded on the English practice. If, as it is stated in the defendant's affidavit, the summons was discharged, it is the more necessary that the attention of the court should be drawn to the fact that the rule was moved upon the original affidavit.

We consider this to be irregular, and though we have thought it better to examine the whole matter, indicating our views, so as to save parties the expense which might attend other applications aiming at the same result, we discharge this rule on the point of practice, and as it is on the ground of irregularity, with costs.

Rule discharged with costs.

## COMMON PLEAS.

(*Reported by* S. J. Vankoughnet, Esq., M.A., *Barrister-at-Law, Reporter to the Court.*)

### Buchanan et al. v. Frank.

*Sheriff—Poundage.*

*Held*, that under Con. Stats., U. C. ch. 22, sec. 271, a sheriff is not entitled to poundage unless he *actually levies the money* due under the writ in his hands; notwithstanding that in consequence of the pressure exerted by seizure of his property the defendant has paid or otherwise settled the debt.

[C. P., H. T., 28 Vic.]

*T. Ferguson* obtained a rule *nisi* on behalf of the sheriff of Middlesex calling on the plaintiff to shew cause why the order made by the Chief Justice of this court on the 7th of February of the present year, whereby it was ordered that the said sheriff should be disallowed all poundage claimed by him for proceeding on the writ of *fieri facias* in this cause, should not be rescinded, on the ground that the sheriff is by law entitled, under the circumstances, to the said poundage, or to some part thereof, and to tax the same against the plaintiff, and on grounds disclosed in affidavits and papers filed.

The affidavits referred to shewed, that the sheriff received an execution against the defendant's goods to levy for debt, interest and costs, $3,465 60; that the sheriff seized of the defendant's goods sufficient to satisfy the amount of the execution; that after such seizure, and without any sale by the sheriff, and without any money having been paid to the sheriff by the defendant, or made by the sheriff, the plaintiffs and defendant arranged the claim between themselves; that the sheriff was requested to render a bill of his fees, which he did, making the total $103 64, of which the poundage constituted $96 64; that the bill was taxed and the poundage was allowed to the sheriff; that the arrangement made with the plaintiffs by the defendant was brought about by the pressure of the seizure which the sheriff had made upon the goods so taken.

*Downey* shewed cause.—This whole question must be determined by the construction to be placed upon the Con. Stats. U. C. ch. 22 ss. 270, 271. The following cases shew that the sheriff, in such a case as this, is not by that statute entitled to poundage, but only to such remuneration in the stead of poundage as shall be specially awarded to him: *Winters* v. *The Kingston Permanent Building Society*, Chy. Chamb. Rep. 276; 1 U. C. L. J. N. S. 107; *Gillespie* v. *Shaw*, 10 U. C. L. J. 100.

*Robert A. Harrison*, with him *Ferguson*, supported the rule.

The statute should not be so rigidly construed as it has been: the sheriff should receive his poundage after a levy has been made; and, if necessary, section 271 should be read as applicable only to cases where there are different writs of execution in the hands of different sheriffs, which would be giving effect to the previous law when it is clear no change was intended by the consolidation, and would harmonize the two sections of the statute:

*Alchin* v. *Wells*, 5 T. R. 470; *Chapman* v. *Bowlby*, 8 M. & W. 249; *Morris et al.* v. *Boulton*, 2 Chamb. Rep. U. C. 60 *Thomas* v. *Cotton*, 12;

U. C. Q. B. 148; *Brown* v. *Johnston*, 5 U. C. L. J. 17; *Walker* v. *Fairfield*, 8 U. C. C. P. 75; *Miles* v. *Harris*, 31 L. J. C. P. 361, S. C. 12 C. B. N. S. 550; *Colls* v. *Coates*, 11 A. & E. 826; *Corbett* v. *McKenzie*, 6 U. C. Q. B. 605; *Gates* v. *Crookes*, 3 U. C. R. O. S. 286; *Leeming* v. *Hagerman*, 5 U. C. R. O. S. 38; Watson on Sheriff, 2nd ed. 110; 9 Vic. c. 56, s. 2, 3, Con. Stats. U. C. c. 2.

A. Wilson, J., delivered the judgment of the court.

As the sheriff is not an officer who at the common law is entitled to recover any fees as remuneration for his services, his sole claim to them being based on positive enactment, we must see whether he has clearly made out his right to the amount he demands, for the burden of establishing them is upon him, before we can rescind the present order which disallows this poundage.

The whole legislative provision is contained in the two sections of the C. L. P. A., ch. 22, secs. 270 and 271. Sec. 270 provides that,

"Upon any execution against the person, lands or goods, the sheriff may, in addition to the sum recovered by the judgment, levy the poundage, fees, expenses of execution, and interest upon the amount so recovered from the time of entering the judgment."

Sec. 271 provides that,

"In case a part only be levied on any execution against goods and chattels, the sheriff shall be entitled to poundage only on the amount so levied, whatever be the sum endorsed on the writ, and in case the real or personal estate of the defendant be seized or advertised on an execution, but not sold by reason of satisfaction having been otherwise obtained, or from some other cause, and no money be actually levied on such execution, the sheriff shall not receive poundage, but fees only for the services actually rendered; and the court out of which the writ issued or any judge thereof in vacation may allow him a reasonable charge for any service rendered in respect thereof in case no special fee be assigned in any table of costs."

Since the case of *Alchin* v. *Wells* it has been settled that after a levy has been made by the sheriff he is entitled to the poundage, although no sale is made, and further proceedings are stayed, in consequence of a compromise between the parties. That decision was made upon the 29 Eliz. c 4, which provides that the sheriff shall receive his poundage "on the sum he shall levy, extend *and* deliver in execution;" and this "levy," as is said by counsel in *Holmes* v. *Sparkes* (12 C. B.,) may be either actual or constructive;" for the money is considered to have been levied by "the sheriff when he enters upon the possession of the goods, and by the compulsion of the levy the defendant has been compelled to pay the debt:" *Chapman* v. *Bowlby*, 8 M. & W. 249. Until a seizure has been made the sheriff is not entitled to poundage; therefore, when the debt is paid to him without a seizure he cannot claim poundage: in such a case there has been no levy made—*Graham* v. *Grill*, 2 M. & S. 296; *Colls* v. *Coates*, 11 A. & E. 826, either actual or constructive.

A seizure, however, is not properly a levy: it does not become a levy until the goods seized have been turned into money: *Miles* v. *Harris*, 12 C. B. N. S. 558; *Drewe* v. *Lainson*, 11 A. & E. 529.

But this money, as before mentioned, need not be made by a sale of the debtor's goods by the sheriff: he may so make the money, but he need not actually do so: if he bring about a payment or settlement of the debt by reason of the compulsion of his seizure, *he* is held under the statute of Elizabeth to have *levied* the money; and if a statute make no difference between an actual and constructive levying of the money, he will still be entitled to his poundage in that case; but if it do make such a difference, we must of course give effect to the provision, however hard it may bear against the officer, who has practically done all or nearly all the duty, and incurred all or nearly all the responsibility to have earned his compensation.

Now our statute, after providing generally for poundage in every case in section 270, provides that in cases where a part only of the debt has been levied, the sheriff shall be entitled to his poundage on the amount so levied; which was a needless enactment, as this has always been the law; and then it provides, as before stated, that "in case the real or personal estate of the defendant be *seized* or advertised on an execution, *but not sold* by reason of satisfaction having been otherwise obtained, or from some other cause, and no money be *actually* levied on such execution, the sheriff *shall not receive poundage*, &c."

Now this enactment does in our opinion establish a distinction, which before that time did not exist, between an actual and a constructive levy, and makes a special provision for those cases in which a mere seizure is made, but which are not followed by a sale, and where no money is actually levied. When the money is actually levied the sheriff may levy his poundage: when the money is not actually levied the sheriff cannot levy or demand any poundage, although he may have seized, but he shall "receive fees only for the services actually rendered."

In the present case the sheriff seized, but he did not sell; nor did he actually levy any money: we have only, therefore, to declare that he is directly within the special provision we have just referred to, and, in the language of the act, that he "shall not receive poundage."

It is of no practical value to follow this further, and to say that the present reading of the law has probably arisen from an unintentional oversight in the work of consolidating, for we must accept the law as it stands. If it were not an intentional alteration, the legislation will no doubt, if it be thought to be expedient, amend the law.

Most of the decisions in our own courts to which we were referred were made upon the law as it stood before the consolidation, and are therefore inapplicable, as are also all of the English authorities. The other cases to which we were referred, and which have been decided since the consolidation, and when the attention of the court was called to the change which had been made in the law, have ended in the same manner as the present one, adversely to the sheriff, and therefore the rule will be discharged with costs.

Rule discharged with costs.

## ELECTION CASES.

(*Reported by* Robert A. Harrison, Esq., *Barrister-at-Law.*)

### Reg. ex rel. Rollo v. Beard.

*Municipal Institutions Act—Disqualification of members of council—Time to which disqualification relates—Costs.*

Where it was shown that the firm of which defendant was a member dealt in coal and wood, and during the year 1864 supplied large quantities of both coal and wood to the Corporation of the City of Toronto, without any arrangement as to price or terms of payment, sold in the ordinary course of business, the price of which was unpaid at the time of the election of defendant to the office of councilman for one of the wards of the city, he was *held* disqualified as being a person having by himself or partners or partner an interest in contracts with or in behalf of the corporation.

So where it was shown that for a small portion, viz., ten tons of coal, there was a tender made by the firm in 1864, which had been accepted by the corporation, and the price remained unpaid at the time of the election.

Where it was shown that the price was paid before defendant took his seat, he was still *held* to be disqualified, the disqualification having relation to the time of the election, and not merely to the time of the acceptance of office.

Parties are not to be discouraged from bringing cases of disqualification under the notice of the proper tribunals for the trial of such questions at the peril of having to lose the costs necessarily incurred, even if successful. Therefore in a case where it was quite apparent that defendant had acted in good faith, yet being held to be disqualified, costs were given against him.

[Common Law Chambers, Feb. 8, 1865.]

The relator complained that George T. Beard, of the city of Toronto, in the county of York, general merchant, had not been duly elected, and had unjustly usurped the office of councilman for the ward of St. James, in the city of Toronto, in the county of York, under the pretence of an election held on Monday and Tuesday, the 2nd and 3rd days of January last, at the Police Court, in the said ward of St. James, in the said city of Toronto; and declaring that he the said relator had an interest in the said election as a candidate, showed the following cause why the election of the said George T. Beard to the said office should be declared invalid and void. That the said George T. Beard was not at the time of the said election qualified to be a councilman and member of the corporation of the said city of Toronto, in this, that before and at the time of the said election he had, by himself, partners or partner, an interest in a contract or contracts, with or on behalf of the corporation.

The statement was sustained by the affidavit of William Hewitt, of the city of Toronto, hardware merchant, wherein he swore that he was a householder entitled to vote at the election of aldermen and councilmen for the ward of St. James, in the said city of Toronto. That as such he voted for aldermen and councilmen for the said ward at the election holden on Monday and Tuesday, the 2nd and 3rd days of January last. That George T. Beard was elected one of the councilmen for said ward at said election. That he did not vote at said election for the said George T. Beard. That the said George T. Beard was not, as deponent was informed and believed, qualified to be elected a councilman and member of the said corporation, in this, that the said George T. Beard had, as deponent was and verily believed, at the time of the election, by himself, his partners or partner, an interest in a contract or contracts with or on behalf of the corporation of the said city. That the said George T. Beard was before and at the time of the said election a member of the firm of "Joshua G. Beard & Sons," wood and coal merchants and stove manufacturers, in the said city of Toronto. That the said Joshua G. Beard, the senior member of the said firm, is, so far as the deponent could ascertain and verily believed, a lessee of the said corporation of the city of Toronto, under a lease from the said corporation, dated 15th January, A.D. 1849, for the term of 21 years, of Lots Nos. 2 & 3, on the east side of Church street, in said city, of an annual rental of sixty-two pounds, which said lease deponent was informed and verily believed contains the usual covenant to pay rent to the said corporation. That the said J. G. Beard, the senior member of the said firm, is, as far as deponent could ascertain and verily believed, also a lessee of the corporation of the city of Toronto, under a lease from said corporation, dated 13th April, A.D. 1863, for the term of 21 years, of a water lot to the south-east of the City Hall, on Esplanade Street, in the said city, at an annual rental of $146, which said lease, deponent was informed and verily believed, contains the usual covenant to pay rent to the said corporation. That the business of the said co-partnership, of which the said George T. Beard is a member, is, as deponent was informed and believed, carried on upon the parcel of land last described. That the said firm of Joshua G. Beard & Sons had, as deponent was informed and verily believed, before and at the time of the said election, a contract or contracts with the said corporation for the delivery of a large quantity of coal to the New Gaol in and for the said city, and for the use of the St. Lawrence Hall in said city. That the said George T. Beard received, as the deponent was informed and verily believed, on the 13th of January last, since said election, from said corporation, for and on account of the contract or contracts last mentioned, the sum of $1,609 09, shown in the books of the said corporation, as follows:—

| | |
|---|---|
| Coal, &c., for Gaol..... | $1,522 84 |
| Coal for St. Lawrence Hall.. | 80 75 |
| Culvert and gratings ..... | 5 50 |
| | $1,609 09 |

Joshua G. Beard, the senior member of the firm of "Joshua G. Beard & Sons," in answer, made oath,—That he is the lessee from the corporation of the city of Toronto, of Lots Nos. 2 & 3, on the east side of Church Street, in the said city, under a lease from the said corporation to deponent alone, dated the 15th day of January, in the year of our Lord one thousand eight hundred and fifty-nine, at an annual rental of sixty-two pounds, for the term of forty-two years. That the said firm of Joshua G. Beard & Sons has no interest whatever in the said lease or in the property therein contained; but the same is deponent's own private individual property, unconnected in any way with the said firm or the said partnership business. That deponent holds no lease from the said corporation dated the thirteenth day of April, in the year of our Lord one thousand eight hundred and sixty-three, of land to the south-east of the City Hall; but is lessee of the said corporation under a lease from the said corporation to depo-

nent alone, dated the thirteenth day of April, in the year of our Lord one thousand eight hundred and sixty-three, for the term of twenty-one years, of a water lot directly south of the said City Hall, at an annual rental of one hundred and fifty-six dollars. That the business of the said firm of Joshua G. Beard & Sons is carried on upon a lot to the east of the said City Hall, of which deponent is the owner in fee simple, where his coal and wood yard and office are situate, and not upon the said lot contained in the lease last herein mentioned, but a few loads of coal and wood have, by deponent's permission, been landed at the wharf on the said lot. That the said lot of land last mentioned was leased by deponent from the corporation for his own use alone, and without any previous arrangement of any kind with the said firm in connection therewith. That there has never been any agreement, verbal or written, between deponent and the said George T. Beard, or between deponent and any member of the said firm, relating to or in any way connected with the said lot of land last herein mentioned or the lease thereof. That being in bad health, deponent has been unable to attend regularly to business during the last nine months.

Defendant made oath, that is he a member of the firm of Joshua G. Beard & Sons, carrying on business as wood and coal merchants and stove manufacturers in the said city of Toronto. That during the year one thousand eight hundred and sixty-four, the corporation of the city of Toronto purchased from the said firm a large quantity of coal for the use of the New Gaol and of the St. Lawrence Hall, in the said city of Toronto; but that as to all, except ten tons of the said coal, there never was any contract or arrangement whatever, either as to the price, quantity, or terms of payment; but the same was ordered by the chairman of the Gaol board of the said corporation, without any previous notice to the said firm, and furnished by the said firm as they might have been ordered from and furnished by any other coal merchants in the said city. That as to ten tons of the said coal, tenders for that quantity of coal were advertised for by the said corporation, and the said firm having sent in a tender, the same was accepted, and the said firm furnished the said coal in the month of September last. That no terms of payment were ever agreed upon therefor, nor any contract, verbal or written, entered into with the said corporation relating thereto, except as aforesaid; but the said tons, as well as all other coal supplied during the said year one thousand eight hundred and sixty-four, were supplied before the first day of December last, and were to be paid for on delivery or demand, and was not paid for in full until the thirteenth day of January last, only because payment was not sooner required. That on the said thirteenth day of January, and before deponent was sworn in or took his seat as a member of the council, which he did on the sixteenth day of the said month of January, the said firm was paid in full for the said coal by the corporation of the year one thousand eight hundred and sixty-four, and he, deponent, had not, when he was so sworn in and took his seat, nor had the said firm, any claim whatever against the said corporation on account thereof, nor had any dispute ever arisen between the said firm or deponent and the said corporation relating to the said coal. That the sum of five dollars and fifty cents mentioned in the eleventh paragraph of the affidavit of Mr. Hewitt, was a payment for goods ordered by the said corporation from the said firm, in the year one thousand eight hundred and sixty-three, without any contract or agreement whatever, and not paid for before only because such payment was not sooner demanded.—The affidavit of defendant was, in all material parts, corroborated by the affidavit of Charles Shall, book-keeper in the employment of Joshua G. Beard & Sons.

*Robert A. Harrison*, for the relator, contended that the word "contract," as used in the Con. Stat. U. C. cap. 54, sec. 73, is to receive a liberal interpretation; that it has been held to extend to leases from the corporation (*Reg. ex rel. Stock* v. *Davis*, 3 U. C. L. J. 128; *Reg.* v. *York*, 2 Q.B. 847; *Simpson* v. *Ready*, 12 M. & W. 344; *The Queen* v. *Francis*, 18 Q. B. 526), and to all cases where goods have been supplied to or work done for the corporation, the price of which is unpaid at the time of the election (*Reg. ex rel. Moore* v. *Miller*, 11 U. C. Q. B. 465; *Reg. ex rel. Bland* v. *Figg*, 6 U. C. L. J. 45; *Reg. ex rel. Davis* v. *Carruthers*, 1 U. C. Pr. R. 116), and that where goods have been supplied without price agreed upon, there is, of anything, greater room for holding the case within the Act than if the goods were supplied at fixed prices, for opportunity would otherwise be given to the seller to procure the acceptance of goods not before accepted, or to procure for them, if accepted, greater prices than their real value (*Ib.*)

*C. Robinson*, Q. C., argued that no interest on the part of defendant was shown in the corporation leases, and that as to the supplies of coal and wood, they were not matters of contract so as to work a disqualification. But admitting the latter to be so, he contended that the disqualification related not to the time of the election, but to the time when the relator took his seat. That *Reg. ex rel. Davis* v. *Carruthers* was decided under Stat. 16 Vic. cap. 181, which enacted that "no person having, by himself or partners, any interest or share in any contract with or on behalf of the township, county, village, town, or city in which he shall reside, shall be qualified to be, or be elected, alderman or councillor for the same in any ward therein; whereas the present Act simply provides "that no person having, by himself or his partners, an interest in any contract with or on behalf of the corporation, shall be qualified to be a member of the council of a corporation (sec. 73.) He urged that no person elected becomes a member of the council till acceptance of office (sec. 130); and that when defendant accepted office, in that case his disqualification was removed.

*Robert A. Harrison*, in reply, pointed out, that by sec. 7 of the Act, the persons qualified to be elected mayors, members of a council, &c., are such residents, &c., as are not disqualified under the Act, and have at the time of the election the requisite property qualification. That there could be no qualification at the time of the election if there were then an existing disqualification, and that an interest in a contract is by the Act expressly declared a disqualification; that by elec-

tion the party elected became a member of the council *in posse* if not *in esse;* and that reading sec. 78 of the Act by itself, the words "member of the council," were not to receive the narrow construction for which defendant contended, but rather a broad and liberal construction, in unison with the object and spirit of the law, which is to secure independent, honest, and impartial men for the situations of public trust created by the Act. (See *Powell* v. *Bradley*, 11 L. T. N. S. 602.)

Hagarty, J.—This is a summons in nature of a *quo warranto*, calling on George T. Beard to show by what authority he claims the office of councilman for the ward of St. James, Toronto. The election was held on the 2nd and 3rd of January, and Mr. Beard was then elected. The objection is wholly to his qualification, viz., that before and at the time of election he had, by himself or his partners or partner, an interest in a contract with the city corporation. It is sworn on the part of the relator, that Beard is a member of the firm of J. G. Beard & Sons. That the senior partner, J. G. Beard, is a corporation lessee of land on which the partnership business was carried on. In reply it is sworn that the partnership, as such, had no interest whatever in the leasehold premises; that only a small portion of the premises was occasionally used for landing coal and wood; the business being actually conducted in other premises, and that the defendant Beard had no interest in the lease, and no agreement existed with the lessee respecting same or the rents or covenants.

No doubt a corporation lessee is disqualified, but nothing appears to me in this case in any way to connect defendant with any obligation, interest, or contract under the lease, and this objection, I think, wholly fails. The remaining one is more serious. It appears that defendant's firm dealt in coal and wood, and during the year 1864, supplied large quantities of both coal and wood to the corporation, as defendant swears, without any arrangement as to price or terms of payment; and in ordinary course of business, for a small portion, viz., ten tons, a tender by defendant's firm had been accepted. No written or other contract, except the contract implied by the relator of vendor or purchaser, existed. All the coal was supplied before the 1st of December, and was to be paid for on delivery or demand, and was not paid for in full until the 18th day of January, 1865, only because payment was not sooner required. Defendant swears that on that day, being after his election but before he had taken his seat, the unpaid balance was paid by the corporation in full. It would seem that the payments made to defendant's firm, in January, amounted to over $1,600.

I think I am bound to hold that a claim against the corporation for the price of goods sold, work and labour, &c., comes clearly within the words of the statute disqualifying any person having, by himself or his partners or partner, an interest in any contract with or on behalf of the corporation. I think this point has been expressly decided before now. The case of *Carruthers* 2 U. C. Pr. R., which was for work done, is hardly distinguishable. I do not, however, see how there can be any doubt on this question. The object of the Act was to keep from the council board any person having any interest in procuring the corporation funds to be applied in satisfying any claims he might have against them for payment. The vendor of goods, as a general rule, has a marked interest in obtaining prompt payment, &c., and very many cases arise in which it is all-important to the public interest that perfectly unbiassed councillors should decide on the amount when the price is not fixed; on the acceptance or rejection of inferior goods or imperfect workmanship; or claims for services of doubtful existence or utility.

The word "contract" is of wide significance, and I think clearly embraces a case like the present. But Mr. Robinson, for the defendant, argues with much force and ingenuity, that even if defendant were disqualified for the above reason when elected, the objection was wholly removed before he took his seat in the new council, viz., on the 18th of January, a day prior to the earliest lawful assembling of the new council. He points out that, in the earlier Acts, the words are that "no disqualified person shall be elected," &c. The last Act governing this case is Con. Stat. U. C. cap. 54, sec. 73, which differs from the preceding Acts, that no disqualified person "shall be qualified to be a member of the council of the corporation;" and the argument is, that this points not to the time of election, but to becoming a member, or, in other words, taking a seat in the new council. And Mr. Robinson urges here, that Mr. Beard wholly ceased to be a contractor, or to have any claims, before the new council had any legal right to meet or act as such. But the last statute says, in sec. 70. "the persons qualified to be elected mayors, members, &c., are such residents of the county within which, &c., as are not disqualified under this Act, and have, at the time of their election, property," &c. Then, the disqualifying clause, sec. 73, declares, amongst other disqualifying clauses, "that no person having, by himself or his partners, any interest in any contract, &c., shall be qualified to be a member." First, we have a declaration that the persons qualified to be elected are those not disqualified under the Act. Next, we have a list of the disqualifications which prevent persons becoming members of the council. I feel no doubt whatever that it is at the time of the election that the disqualification or disqualifications of the candidate is to be considered. He is then either a qualified or a disqualified person for the suffrages of the electors. I should hold the same opinion if I had nothing but the 73rd section to guide me. To refer the qualification to the time when the person elected might actually take his seat at the council board, would be, in my judgment, wholly at variance with the spirit of the Act of Parliament, and fatal to the usefulness of this very wholesome provision as to disqualifications.

In the present case we may possibly regret the result from a conviction of the apparent good faith of the whole proceeding. We may be satisfied that the disqualification was wholly accidental, and that Mr. Beard might as readily have settled with the corporation and removed all objections before the election as after. But the rule must not be infringed; the election must be set aside, and a new election had.

I unwillingly feel compelled to make defendant pay costs. But I think I cannot weaken the effect of this wholesome provision by discouraging parties from bringing a case of disqualification under notice at the peril of having to lose the costs necessarily incurred. The defendant might have disclaimed, and saved further expenses. He must be unseated, with costs.

Order accordingly.*

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### The Queen on the relation of Bugg v. Smith.

*Con. Stat. U. C. cap. 54, sec. 73—Insurance agent—Not disqualified to be member of City Corporation.*

An agent of an insurance company paid by salary or commission, who both before and since the last municipal election in the City of Toronto had, on behalf of his company, effected insurances on several public buildings, the property of the Corporation of the City of Toronto, and on several common school buildings within the city, and who at the time of the election had himself rented two tenements of his own to the Board of School Trustees for common school purposes, *held* not to be "a person having by himself or his partner an interest in any contract with or on behalf of the Corporation," and so not disqualified under s. 73, of Con. Stat. U. C. cap. 54, to be and become an alderman for a ward within the city at the last municipal election.

[Common Law Chambers, Feb. 11, 1865.]

The relator complained that James E. Smith, of the City of Toronto, in the County of York aforesaid, one of the United Counties of York and Peel, merchant and insurance agent, had not been duly elected and had unjustly usurped the office of Alderman for the Ward of St. John, in the said City of Toronto, under the pretence of an election held on Monday and Tuesday, the second and third days of January, in the year of our Lord one thousand eight hundred and sixty-five, in and for the Ward of St. John in the said City of Toronto; and declaring that he the said relator had an interest in the said election as a candidate, shewed the following causes why the election of the said James E. Smith to the said office should be declared invalid and void.

1st. That the said James E. Smith at the time of the said election was disqualified in this, that he had at the time of the said election an interest in contracts with the corporation of the City of Toronto, effected with the said corporation by him, the said James E. Smith, as agent of the Imperial Insurance Company, for the insurance against loss by fire of certain buildings, houses and tenements, the property of the said corporation, all of which were subsisting at the time of the said election and still are subsisting contracts; and the said James E. Smith as such agent of said insurance company being paid by such company by commission or salary proportionate to the amount of risks for valuable consideration in that behalf, secured by him for the said insurance company or otherwise to the same effect.

2nd. That the said James E. Smith, since said election, had become disqualified to hold the said office in this, that he has an interest in contracts with the corporation of the City of Toronto, effected since said election with said corporation by him, the said James E. Smith, as agent of the Imperial Insurance Company, for the insurance against loss by fire of certain buildings, houses and tenements, the property of the said corporation, the said James E. Smith being paid by said company by commission or salary proportionate to the amount of risks for valuable consideration in that behalf, secured by him for the said insurance company or otherwise to the same effect.

3rd. That the said James E. Smith at the time of the said election was disqualified in this, that he had at the time of the said election an interest in contracts with or on behalf of the corporation of the City of Toronto, effected with or on behalf of the said corporation, or the school trustees of the said City of Toronto, by him, the said James E. Smith, as agent of the Imperial Insurance Company for the insurance against loss by fire of certain schoolhouses and appurtenances in the said City of Toronto, all of which contracts were subsisting at the time of the said election and still are subsisting contracts, the premiums therefor being paid directly or indirectly by the corporation of the said City of Toronto; and the said James E. Smith being paid by said company by commission or salary proportionate to the amount of risks for valuable consideration in that behalf, secured by him for the said insurance company or otherwise to the same effect.

4th. That the said James E. Smith at the time of the said election was disqualified in this, that he at the time of the said election had an interest by himself or his partner or partners in a contract or contracts with or on behalf of the corporation of the said City of Toronto, or the school Trustees of the said City of Toronto for the leasing or renting by him the said James E. Smith, his partners or partner, of two houses on Centre Street in the said City of Toronto, used as schoolhouses in said city, the rent therefor being paid directly or indirectly by the corporation of the said City of Toronto, and the said contract or contracts being subsisting at the time of the said election and still subsisting.

The relator made affidavit that he is a resident freeholder in the City of Toronto, having real estate sufficient to entitle him to become an alderman of the council of the corporation of the said city. That he was a candidate for the office of alderman for the Ward of St. John, in the said City of Toronto, at the last municipal election, holden in and for the said ward in said city on Monday and Tuesday, the second and third day of January last past. That Robert Moodie, of the said City of Toronto, innkeeper, and James E. Smith, of the said City of Toronto, merchant and insurance agent, were also candidates at said election in and for the said office of aldermen in and for the said ward. That according to law the said ward was and is entitled to be represented in the council of the said city by two aldermen and two councilmen. That at the close of the said election the votes for aldermen in said ward stood as follows:

| | |
|---|---|
| Robert Moodie | 635 |
| James E. Smith | 568 |
| John Bugg | 888 |

That the said Robert Moodie and James E. Smith were thereupon declared duly elected as aldermen for the said ward, and have since accepted the said office. That the said James E. Smith was before and at the time of the said election a

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* As to costs, see *Reg. ex rel. Charles* v. *Lewis*, 2 U. C. Cham. R. 177, Burns, J.; *Reg. ex rel Hawke* v. *Hall*, 2 U. C. Cham. R. 187, Sullivan, J.; *Reg. ex rel. Dillon* v. *McNeill*, 5 U. C. C. P. 137, Macaulay, C. J.

member of the firm of J. E. Smith & Co., wholesale dealers in the said City of Toronto. That the said James E. Smith was before and at the time of the said election, and still is an agent for the Imperial Insurance Company for the purpose of accepting risks for and on behalf and in the name of the said company against fire, on houses and other tenements. That the said Jas. E. Smith was also, as deponent was informed and verily believed, before and at the time of the said election the owner by himself, his partners or partner, of two houses situate on Centre Street in the said city before and at the time of the said election, rented for school purposes in said city as hereinafter mentioned. That the said James E. Smith was, as deponent was informed and verily believed before and at the time of the said election, and still is paid for his services as agent of the said insurance company, by salary or commission, in proportion to the number of risks secured by him for valuable consideration in that behalf for said insurance company or otherwise, to the effect last mentioned. That the said Jas. E. Smith acting as agent for the said insurance company, has induced the said corporation to insure against loss by fire with said insurance company the following public buildings and personal property of the corporation of the said city, for the amounts and at the rates and for the premiums undermentioned:

| | Amount. | Rate. | Premium. |
|---|---|---|---|
| Crystal Palace..... | $8,000 | at 20s..... | $80 00 |
| House of Refuge..... | 4,000 | at 12s. 6d. | 25 00 |
| New Gaol..... | 6,000 | at 12s. 6d. | 37 50 |
| St. Lawrence Hall and Arcade..... | 8,000 | at 12s. 6d. | 50 00 |
| Furniture in City Hall..... | 2,500 | at 15s..... | 18 75 |
| | $28,500 | ..... | $211 25 |

That all the said insurances had been, as deponent was informed and verily believed, effected by the said James E. Smith with the said corporation during the months of November, December and January last past; and that as deponent was informed and verily believed, receipts for premiums paid were, at the times of payment of premiums, given by the said James E. Smith to the said corporation. That the said James E. Smith, acting as agent for the said insurance company, induced the said corporation, or the board of school trustees for the City of Toronto, to insure against loss by fire with him, the said James E. Smith, on behalf of the said insurance company, the following common schoolhouses in said city for the amounts and for the premiums undermentioned:

| | Amount. | | Premium. |
|---|---|---|---|
| Palace Street School..... | | | |
| Givens Street School..... | $6,900 | ... | $58 75 |
| Additional Building of Louisa Street School ..... | | | |
| George Street School..... | 2,000 | ... | 12 50 |
| | $8,900 | ... | $71 25 |

That policies for said insurances last mentioned were, as deponent was informed and verily believed, issued by the said James E. Smith to the said school trustees, or to the said corporation, before the said election, and were subsisting at the time of the said election and are still subsisting. That the amount of such premiums last mentioned, together with other expenditure incidental to the common schools aforesaid, are as deponent was informed and verily believed, directly or indirectly, paid to the said James E. Smith by the said corporation of the said City of Toronto. That the houses mentioned in paragraph ten of his affidavit are situate on Lot No. 41, on the west side of Centre Street, in the said City of Toronto. That the said lot last mentioned, according to the books of the Registrar of deeds in and for the said City of Toronto, is (subject to a mortgage thereon for the sum of £300) the property of the said James E. Smith. That the rental paid for the use of said houses on said lot last mentioned is $140 per annum, being in deponent's opinion much more than the fair value thereof; and that said rent was, as deponent was informed and verily believed, directly or indirectly, paid by the said corporation of the said City of Toronto.

*Robert A. Harrison*, for the relator, moved, upon reading the statement and affidavits filed in support of the same, together with the recognizance of the relator and his sureties therein named, and the same being allowed as sufficient for an order for a writ of summons to issue calling upon the said James E. Smith to shew by what authority he, the said James E. Smith, now exercises or enjoys the office of alderman for the Ward of St. Johns in the City of Toronto. Mr. Harrison submitted that the defendant was in law disqualified as having an interest in the existence or continuance of contracts with or on behalf of the corporation, and so within the letter and the spirit of sec. 73 of Con. Stat. U. C. cap. 54. He contended that the evil contemplated being evident and the words used general. The act should be construed so as to extend to all cases that come within the mischief, and argued that this case was one clearly within the mischief of the act. He referred to *Towsey* v. *White*, 5 B. & C. 125, 131; *Reg. ex rel. Armor* v. *Coste*, 8 U. C. L. J. 290.

Hagarty, J., having taken time to consider, held that Jas. E. Smith was not, upon the facts stated, to be deemed "a person having by himself or his partner an interest in any contract with or on behalf of the corporation," within the meaning of the statute, and so refused the order.

Order refused.

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## Reg. ex rel. Grayson v. Bell.

*Municipal Institutions Act, ss. 70, 175, 183—Qualification—Declaration of qualification—Misstatement therein—How election affected thereby.*

The power of a judge under s. 128 of the Municipal Institutions Act as to the issue of a *quo warranto* summons is to be exercised upon a relator shewing reasonable grounds for supposing that the election was not legal, or was not conducted according to law, or that the person elected thereat was not duly elected; but where the relator admitted a qualification in fact, and made no complaint as to the legality of the election or the conduct of it, contenting himself with attacking the declaration of qualification subsequently made by the candidate, the writ was refused.

[Common Law Chambers, February 13, 1865.]

The relator complained that Robert Bell, of the city of Toronto, painter, had not been duly elected to, and had unjustly usurped the office of

councilman for the ward of St. Andrew, in the said city of Toronto, under the pretence of an election, held on Monday and Tuesday the second and third days of January, 1865, at the said ward of St. Andrew, in the said city, and declaring that he the said relator had an interest in the said election, as an elector in the said ward, who gave his vote at the said election, shewed the following causes why the said election of the said Robert Bell to the said office should be declared invalid and void—

1st. That the said Robert Bell has not, and at the time of the said election had not the necessary property qualification as a freeholder for election as councilman, for the reasons following, namely: that at the time of the said election, and the making and subscribing the declaration required by the 175th section of the 54th chapter of the Consolidated Statutes of Upper Canada, the said Bell was not the proprietor in fee simple of the lands and premises mentioned and described by the said Bell in the said declaration.

2nd. That the said lands and tenements mentioned in the said declaration are the lands and tenements of the trustees of the Toronto General Hospital, and the said Bell is the lessee of the said trustees, and never was the proprietor of the said lands and tenements, or interested therein, except as tenant.

3rd. That before the election for councilman for the said city of Toronto for the year of our Lord one thousand eight hundred and sixty-five, the said Bell mortgaged his interest in the said leasehold premises for four hundred dollars or thereabouts, as appears by the records in the registry office in and for the said city of Toronto, and the said mortgage, as appears by the said records is still unpaid and undischarged.

4th. That at the time of the taking of the last assessment for the city of Toronto, he was not the owner of the property on which he claims to qualify as freeholder, and that he falsely and fraudulently represented in his said declaration of office that he was the owner in fee of the said lands and tenements.

5th. That inasmuch as the said Bell has not made and subscribed the declaration as required by the 175th section of the 54th chapter of the Consolidated Statutes of Upper Canada, and within the time required by the 183rd section of the said chapter of the said Statutes of Upper Canada, he, the said Bell, is therefore disqualified from holding said office of councilman for the said ward of St. Andrew for the said city of Toronto.

The relator made oath that he was at the time of the municipal elections held in the said city of Toronto, on the second and third days of January last past, a freeholder in the ward of St. Andrew, in the said city, and had been for upwards of one month next before the said election, and was at the time of said election, and still is, a resident in the said ward and a freeholder therein.

At the said election he gave his vote in the said ward for David Kennedy and William Moulds, candidates for election as councilmen for the said ward: that Robert Bell was a candidate for election at the said election as councilman for the said ward, and received votes thereat as such candidate, and at the close of the said poll on the second day of the said election was declared by the returning officer duly elected to the said office of councilman, and has since taken his seat as such councilman in the council of the corporation of the said city: that the said Robert Bell in his declaration in that behalf made and subscribed by him after the said election states, as his property qualification for the said office, an estate in freehold, to wit—three dwelling houses and premises in Camden street, in St. Andrew's ward, in the said city of Toronto: that the deponent examined the last revised assessment rolls for the said city of Toronto, for the year of our Lord one thousand eight hundred and sixty-four, and found that the name of the said Robert Bell appears thereon as stated for the said premises on Camden street as a leaseholder for $186, and that he is not rated for any other property in the said city: that the said premises on Camden street aforesaid on which the said dwelling houses are erected is leased by said Bell from the trustees of the Toronto General Hospital, being lot number three on the north side of Camden street aforesaid, with a frontage of fifty-two feet, and about eighty-six feet deep: that the deponent examined the records in the registry office of the said city, and it thereby appears that at the time of the taking of the assessment for the said city for the year of our Lord one thousand eight hundred and sixty-four, the leasehold interest of the said Bell in said premises on Camden street aforesaid was mortgaged by the said Bell for the sum of one hundred pounds, and the said mortgage does not appear from the said records to be discharged: that at the time the said Bell made and subscribed the declaration of office, as required by the 175th section of the 54th chapter of the Consolidated Statutes of Upper Canada, the said Bell falsely and fraudulently represented that he was the owner in fee simple of the said land and premises mentioned in the said declaration, as appears by the said declaration, when in fact he only held the said premises as tenant: that the declaration of office made and subscribed by the said Bell pursuant to the statute in that behalf, is in the words following:—

I, Robert Bell, do solemnly declare that I am a natural born subject of Her Majesty: that I am truly and *bona fide* seized or possessed to my own use and benefit of such an estate in freehold, to wit three houses and premises on Camden street, in St. Andrew's ward, as doth qualify me to act in the office of councilman for the ward of St. Andrew, according to the true intent and meaning of the said municipal laws of Upper Canada.

(Signed) Robert Bell.

H. J. Bradbeer made oath that he made inquiry in the offi.e of the Toronto General Hospital Trust, and found that the said Robert Bell is lessee of lot number three on the north side of Camden Street, in the said city of Toronto, having a frontage on said Camden street of fifty-two feet, and a depth of about eighty-six feet: that the said property is leased to the said Bell for the term of twenty-one years, and said term commenced on the eleventh day of July, in the year of our Lord 1855, and that the rent paid by said Bell to said Hospital Trust is $36.40 per annum.

John Carr, the city clerk, certified that Mr. Robert Bell was assessed in the assessment roll for the ward of St. Andrew for the year 1864, upon which he qualified as councilman for St. Andrew's ward, for 1865, as follows—

Camden-street, N. S.

No. 718—Robert Bell, leasehold, Robert Bell, painter, leasehold .....$72 72
No. 719—Donald Grant, household, Robt. Bell, painter, leasehold..... 42 42
No. 720—Robert Johnston, household, R. Bell painter, leasehold ..... 72 72

And that the above property was entered in the declaration of qualification book of the city of Toronto, as in "freehold," in place of, as property, in "leasehold."

*A. McNab* for the relator, referred to Con. Stat. U. C., cap. 54, ss. 72, 175 and 183.

HAGARTY, J.—The Municipal Institutions Act, section 175, requires that each person elected shall before taking office make a declaration of qualification. This was made by Mr. Bell, declaring that he was "seized or possessed to his own use and benefit of such an estate in freehold, to wit, three houses and premises on Camden-street, in St. Andrew's ward, as doth qualify him to act in the office of councilman, &c." It is now stated as a matter of fact that Bell is not the owner of an estate in freehold in the property mentioned.

On the assessment roll he appears as a leaseholder, rated for these premises at $186 per annum, and it is admitted that he is correctly assessed therefor at that rate. Now, section 70 of the act declares that $160 per annum is a sufficient qualification for a councilman. Mr. Bell therefore, as a matter of fact, was duly qualified when he was elected.

I am, however, asked to grant a *quo warranto* summons, on the ground that although true it is he was qualified, and made a declaration to that effect, yet as the declaration for some reason or other describes his estate as a freehold, instead of a leasehold for years, the election should be declared void.

The judge to whom application is made for a *quo warranto* summons under s. 128 of the act, may order the writ to issue, if there be reasonable grounds for supposing that the election was not legal, or was not conducted according to law, or that the person elected thereat was not duly elected. Nothing of this kind is here suggested. If Mr. Bell's declaration has been made in bad faith, there is ample redress provided therefor by s. 423 of the act, and I think I must leave all persons considering themselves aggrieved thereby to seek the remedy provided by the statute. The candidate being in fact fully qualified, it is difficult to understand what evil motive could have induced the misstatement in the declaration. I am very far from adopting the confident assertions of the relator charging that such misstatement was made falsely and fraudulently.

As Bell was properly qualified, and nothing is alleged against the manner of his election, I do not see how I can interfere by *quo warranto*, because no apparent mistake has been made in the description of the nature of an estate in property, amply sufficient in itself as a qualification. If it were more than a mistake the parties have another and different remedy.

I refuse the summons.

Summons refused.

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## COMMON LAW CHAMBERS.

(*Reported by* R. A. HARRISON, Esq., *Barrister-at-law.*)

### KELLY V. HENDERSON.

*Arbitration—Admission in writing as to taxation of costs—Meaning thereof.*

Where plaintiff sued defendant, an attorney, for the amount of an account, and defendant set off several bills of costs, including three in the County Court, several in the Division Court, and some for insolvency and conveyancing, and the cause was referred to arbitration; and after the reference, plaintiff, an unprofessional man, signed a memorandum as follows: "I admit the within account, subject to taxation of all items that are properly taxable by W. Northrup; and I agree and consent that the arbitrators in the within cause allow the within account in the arbitration, subject to taxation of all items, properly taxable as aforesaid, charged for costs in suits:" *Held*, that not only were the costs in the County Court suits taxable, but the costs in the Division Courts, insolvency fees, &c., were also taxable.

[Chambers, Jan. 22, 1865.]

The plaintiff sued defendant, an attorney, at Belleville, on an open account for goods. Defendant denied the claim, and set off an attorney's bill for costs of suit, conveyancing, &c., and a sum of money due on a mortgage.

The case was referred to the award of F. McAnnany, Esq.

Pending the reference, the plaintiff and defendant met, and each signed a paper. The plaintiff signed this:—"I admit the within account, subject to taxation of all items that are properly taxable by W. Northrup; and I agree and consent that the arbitrators in the within cause allow the within account in the arbitration, subject to the taxation of all items, properly taxable as aforesaid, charged for costs in suit"

Defendant, in consideration of this admission, admitted plaintiff's account in writing.

On going to the office of the deputy clerk of the Crown to tax, the parties differed as to the extent of his right so to do, under the admission.

The bill contained three items for suits in the County Court, and several items for Division Court suits, insolvency costs, conveyancing, &c. The plaintiff contended that the whole bill was taxable. The attorney, on the contrary, contended that the only items properly taxable were the three items relating to the County Court suit. The deputy clerk of the Crown adopted the latter view.

A summons was obtained on behalf of the plaintiff calling upon the attorney, among other things to shew cause why the admission should not be rescinded on the ground of fraud, and why all the bills should not be referred to taxation.

*S. Richards*, Q. C., shewed cause.

*John Paterson* supported the summons. Several affidavits were filed by each party, of a very contradictory character.

HAGARTY, J.—I think Mr. Northrup, the deputy clerk of the Crown, has taken an unnecessarily restricted construction of the admission. The defendant was dealing with an unprofessional opponent, and it seems to me that the construction that the latter would reasonably put on the words used would cover all items "charged for

costs in suits," without reference to the courts in which such suits or business might be; and that to restrict it merely to the three bills is unfair towards the plaintiff, and not required by a reasonable construction. The costs in the two suits of *Kelly* v. *Robinson* (of course including the retaining fee charged), the costs in *Kelly* v. *McDonell*, all the Division Court suits and fees, and business done as to transcript, &c., the insolvency costs in another matter, and costs or fees in a criminal charge or suit, should, I think, be included in the taxation.

No doubt the attorney swears he did not mean all this; but I think his opponent, in all human probability, so meant and understood it; and I think justice may be done without straining the words beyond a reasonable construction.

As to the various allegations of fraud in the obtaining these memoranda of agreement, I may say that I have no present power over them. The matter has devolved upon the arbitrator, Mr. McAnany. He can deal with them as a court and jury could deal with admissions, oral or written, said to be made a few days or weeks before the trial.

It would be a good answer to an admission or a receipt, that it was obtained by fraud, or not properly understood by the person making it, or made under a mistake, &c. I pass no opinion on the merits or demerits.

As to the alleged error in a considerable sum paid on the mortgage, Mr. Richards, who appears for defendant, says he has no doubt the defendant has no desire to take any advantage of any supposed admission, if the mistake be clearly shewn. I trust, for the honor of the profession, that this honest expression of opinion rests on a sure foundation. If not, the arbitrators must deal with it.

I discharge the summons, as I have no power to make it absolute. I might have done so without expressing any opinion. I have written thus far in the hope that my suggestions may help a final solution of this most melancholy example of litigation about a very simple matter, needlessly extended over several years, at a ruinous expenditure of costs.

I discharge the summons without costs: neither party should have any costs.

Summons discharged, without costs.

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## Dougall v. Yager.

*Con. Stat. U. C., cap. 26, sec. 8—Execution debtor applying for discharge from custody—Sufficiency of affidavit.*

*Held*, that an affidavit by an execution debtor applying for his discharge from close custody, must, under sec. 8 of Con. Stat. U. C., cap. 26, be positive to the effect that he is not worth $20, exclusive of his necessary wearing apparel, &c.

[Chambers, Jan. 4, 1865.]

*C. E. English*, obtained a summons calling on the plaintiff to shew cause why defendant, a prisoner in close custody of the sheriff of the county of Hastings in execution for debt, should not be discharged from custody, upon the ground that he was not worth $20, exclusive of his necessary wearing apparel, &c., and upon grounds disclosed in affidavits and papers filed.

He filed an affidavit of the defendant, in which among other things he swore that he was a prisoner in close custody, on a writ of *capias ad satisfaciendum*; that the judgment was entered on three promissory notes on which he, defendant, became liable as surety for one Peter F. Bell, the first of which is dated on or about 29th October, 1863, for $150; second, 1st February, 1864, for $304 22; and third, 19th May, 1864, for $212; that judgment was entered on 30th September, 1864, for $750 76; that plaintiff had not served him, defendant, with any interrogations herein, but caused him to be examined orally before Anson Gilbert Northrup, clerk of the County Court, under an order of Wm. Smart, judge of the county of Hastings; that he, defendant, had answered everything truly as nearly as he could; that he was a man of very little education, had never kept any books of accounts and was obliged to answer from memory; that Adam Wallbridge owed him $50; that he defendant was willing to assign to the plaintiff any interest he might have therein, "after paying him, Wallbridge, his lien upon it for getting him, defendant, out of gaol;" that excepting the said sums, such interest as he might have therein, which he did not believe to be worth five pounds or anything of any consequence, he was not worth $20, exclusive of his ordinary wearing apparel.

*Robert A. Harrison*, shewed cause. He objected that the affidavit under Con. Stat. U. C., cap. 26, sec. 8, should be positive; that defendant's affidavit was not positive; that it appeared from it he was worth more than $20, for Mr. Wallbridge could have no lien such as represented for future services on $50 admitted to be due by him to defendant.

*C. E. English*, supported the summons and argued that the affidavit was sufficient, and that at all events upon reference to defendant's oral examination it would be found he was not worth $20, exclusive of his necessary wearing apparel.

Richards, C. J.—The affidavit is the foundation of the proceeding now taken by defendant with a view to his discharge from close custody, and must comply with the provisions of the statute. The statute requires a positive affidavit and the affidavit made by defendant is in no sense positive. If he cannot conscientiously make the affidavit which the statute requires, he is not entitled to avail himself of its provisions. I discharge the summons, but without costs.

Summons discharged without costs.*

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## Dougall v. Yager.

*Using affidavits filed on a former application—Form of summons—Refiling affidavits.*

Where leave is given, on an application for a summons, to use the affidavits filed on a former application, which was unsuccessful, such affidavits must either be refiled or specifically referred to in the summons.

[Chambers, Feb. 24, 1865.]

*W. A. Foster* obtained a summons, "upon reading the affidavits and papers filed on the former applications," (of which there had been two,) for the discharge of the defendant in this cause, and the further affidavits "now filed," calling upon the plaintiff to show cause why the

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* Defendant made a second application and filed a positive affidavit that he was not worth $20, but in no manner attempted to explain how he had disposed of the amount admitted to be due him by A. H. Wallbridge, and upon this ground, Draper, C. J., discharged the second summons.—Eds. L. J.

defendant should not be discharged from custody under the act respecting the relief of insolvent debtors (Con. Stat. U. C. cap. 26, sec. 8), upon grounds disclosed in said affidavits and papers filed, with leave to defendant to use his examination filed in the office of the court, if so advised.

*R. A. Harrison* shewed cause, and objected that the particular affidavits upon which defendant relied as disclosing the grounds of his application, should either have been refiled on this application, or else more specifically referred to in the summons, and contended that the only affidavits really filed on this application disclosed no grounds whatever for the application.

*C. E. English* supported the summons, contending that he was in a position to refer to the affidavits already on the file of the court for the discharge of the defendant, and that his summons was sufficiently specific to enable him to do so.

The following cases were referred to in the argument: *Atkins* v. *Reynolds*, 2 Chit. R. 14; *De Woolf et al.* v. ——, 2 Ib. 14; *Cliffe* v. *Prosser*, 2 Dowl. P. C. 21; *The King* v. *Kirke*, 5 B. & Ad. 1089; *Reg.* v. *Peterhouse*, 1 Q. B. 314; *Small* v. *Eccles*, 1 U. C. L. J. N.S. 122; 2 Chit. Archd. 11 ed. 1567.

Morrison, J.—I think the objection must prevail. The summons will therefore be discharged, but without costs. Defendant may of course make a fresh application.

Summons discharged, without costs.*

## CHANCERY.

(*Reported by* F. W. Kingstone, Esq., *Barrister-at Law.*)

### Harrison v. Armour.

*Equitable Mortgage—Registration.*

A memorandum of deposit given with deeds deposited by way of equitable mortgage is not a "deed, conveyance, or assurance," within the meaning of Con. Stat U. C. cap. 89, sec. 17, and does not require registration. Such a memorandum is only a matter of evidence, the mortgage being created by the deposit of the deeds.

*Semble*, There may be a difference between an executed and an executory contract to assign.

[Nov. 15 and April 18, 1865.]

This was an appeal from the master's report. On the 28th September, 1857, the defendant, Armour deposited four mortgages with the plaintiff as security for a loan of £1000, and at the same time gave him the following memorandum of deposit:—

| | |
|---|---|
| "William Armour to Robert Armour..... | £500 |
| James S. Bailey to Robert Armour..... | 1498 |
| Wm. John Fraser to Robert Armour..... | 240 |
| Johnstone & White to Robert Armour..... | 140 |
| | £2378 |

I have this day borrowed from Mr. Duncan B. Harrison one thousand pounds, and I have deposited with him the above mortgages as security for the re-payment, one half at two months and one half at six months, and I agree to execute any power of attorney or other writing to empower said Duncan B. Harrison to transfer or contract the same. Robert Armour.

September 28, 1857."

This memorandum was not registered. On the 8th of February, 1859, the defendant Fanson recovered a judgment against the defendant Armour, and registered it in the county of Durham. Subsequently the plaintiff obtained a decree for sale of the lands comprised in the mortgages deposited with him. And the master by his report found that as to the land in Durham the plaintiff was first and the defendant Fanson second in priority. Against this finding the defendant Fanson appealed on the ground that the master should have found that by reason of the non-registration of the memorandum of deposit the plaintiff was postponed to him.

*Fitzgerald* for the appeal.

*Kingstone* for the report.

The following authorities were cited in the argument. Con. Stat. U. C. cap. 89, sec. 53; 7 Anne, cap. 20, sec. 65; *Wright* v. *Stanfield*, 27 Beav. 8; *Moore* v. *Culverhouse*, 27 Beav. 639; *Reg.* v. *Reg. of Middlesex*, 15 Q. B. 976. Rigge on Registration, p. 104, Prec. No. 4; *Galt* v. *Bush*, 8 Grant, 360; *McMaster* v. *Phipps*, 5 Grant, 256; *Ex parte Nielson*, 14 Jur. 1011.

Spragge, V.C.—The point argued before me is whether or not the memorandum, as above set out, is capable of or requires registration. In the case which I have just disposed of, *Robson* v. *Carpenter*,* I considered the effect of the cases before the master of the rolls: *Wright* v. *Stanfield*, 27 Beav. 8; and *Moore* v. *Culverhouse*, 27 Beav. 639. In the former case the paper was in this form: "*Memorandum.*—In consideration of your having this day advanced and lent to me the sum of £125, for which I have given you my warrant of attorney, I hereby agree to charge my leasehold houses situate in Grosvenor street, Pimlico, with the payment of the same, and I hereby undertake at your request and at my own cost to execute a proper assignment of the said premises as you may direct, &c." This paper the master of the rolls held not registrable, but he held the paper in *Moore* v. *Culverhouse* registrable. Counsel distinguished the latter case from the former on the ground that in the former the contract was merely executory. The mortgagee having agreed to execute at a future time an assignment; and which assignment therefore it was impossible to register until it had been completed; whereas in the latter case there was an equitable assignment of the existing interest of the depositor, and nothing more remained to be done by him. By comparing the papers in the two cases it will be seen that the one in the earlier case is not less formal than the other. The only distinction attempted to be drawn was, the agreement in the earlier case to execute an assignment, and to this Sir John Romilly seems to have acceded.

There is an older case of *Sumpter* v. *Cooper*, which was not referred to in *Moore* v. *Culverhouse*, though it had been cited in *Wright* v. *Stanfield*. In that case an equitable mortgage was created by deposit of title deeds, and sometime afterwards the depositor executed an assignment to the depositee, but which assignment was not registered; and it was contended that whatever lien was obtained upon the premises by the depositor, as equitable mortgagee, was merged when he took an absolute assignment of the same property, and that by that assignment his title must stand

* Defendant made a fresh application, which was refused on the merits.—Eds. L. J.

* Not yet reported.—Eds. L. J.

or fall. The judgment of Lord Tenterden was given after taking time to consider upon this point. It is very short. "As to the statute, of course, we think it cannot be held to apply to the case of an equitable mortgage. It refers only to the registration of deeds; and where there is merely a lien or equitable mortgage created by the deposit of deeds, there is no instrument to be registered."

These cases are thus noticed by Lord St. Leonards: (V. & P. 14 Ed. 727.) After giving instances of instruments not requiring registration, he says, "nor does an agreement to assign a leasehold estate as a security for a loan," and for this he cites *Wright* v. *Stanfield*. He proceeds, "for the statute does not apply to the case of an equitable mortgagee," for which he cites *Sumpter* v. *Cooper*. He then refers to *Moore* v. *Culverhouse*, in which he says, "the master of the rolls held otherwise, and considered that his own decision was the only authority the other way, and he thought his former decision rested on different grounds; but in the case of *Sumpter* v. *Cooper* in 1831 the court of King's Bench expressly decided that the statute did not apply to the case of an equitable mortgage," and he then adds the words of Lord Tenterden, "It refers only to the registration of deeds, and where there is merely a lien or equitable mortgage created by the deposit of deeds there is no instrument to be registered." It is clear enough that where an equitable mortgage is created simply by the deposit of deeds, there can be no instrument to be registered; but, I think it is evident, that both Lord Tenterden and Lord St. Leonards meant that the memorandum of deposit, which, though it is not essential to the validity of an equitable mortgage, ought, it is said, always to be made and signed when title deeds are deposited, is not an instrument which requires registration. What is meant I have no doubt is that it is the deposit which creates the equitable mortgage, that the memorandum is not a deed or conveyance; or, in the language of our statute, "a deed, conveyance, or assurance, affecting lands," but simply a memorandum shewing as a piece of evidence the purpose for which the deposit of title deeds is made; a purpose which may be shewn by parol, but is better shewn by a memorandum in writing, and it is on this ground I apprehend that Lord St. Leonards questions the case of *Moore* v. *Culverhouse*.

But supposing both the cases before Sir John Romilly to be good law, this case falls within the one in which the instrument was held not to require registration, the paper in this case, as in that, containing, in addition to the memorandum an agreement to execute a transfer, the ground upon which in the latter case the earlier ones are supposed to be sustainable.

My conclusion is that the paper in question did not require registration, and that the appeal from the master must be disallowed, with costs.

With regard to the state of the law in regard to instruments incapable of registration, but which create equities to which the court is bound to give effect, it is a question for the legislature. In this case, however, there appears to be no real hardship, as the party seeking priority is a judgment creditor, who has no equity whatever to be preferred to the plaintiff.

## INSOLVENCY CASES.

Before the County Court for the County of Elgin.

### In re John Campbell.

*Election of assignee—Appointment of agent must be in writing, and filed of record.*

At the first meeting of creditors to choose an assignee, several creditors appeared in person, and some by attorney, under appointments in writing duly authenticated.

Mr. Scarth, the clerk of Messrs. Adam Hope & Co., claimed a right to represent them as being their clerk; but exhibited no authority from them in writing. He stated that he was not aware it was necessary: that he could make oath to their being creditors of the insolvent, and of his being their agent duly appointed.

Hughes, Co. J.—From the analogy which proceedings under the Insolvent Act of 1864 bear to proceedings in bankruptcy in England, and because the practice in bankruptcy requires an appointment under a duly authenticated letter of attorney to entitle a person calling himself the representative of a creditor to advise in the choice of an assignee, I must decline to take the advice of any person not appearing to be so duly authorised; and, more than all, the authority must be filed of record.

The other creditors then stated that they were satisfied of Mr. Scarth's being duly authorised, and consented to his being sworn, and to his advising upon the choice of an assignee.

Upon this consent Mr. Scarth was sworn, and an assignee was unanimously elected.

## UNITED STATES REPORTS.

### Commonwealth of Penn. for use of Benjamin Kellogg, &c., v. Alfred C. Harmer, et al.

1. The liability of a Recorder of Deeds on a false certificate of search, only extends to the party taking the certificate, and does not entitle a future purchaser to recover against him.
2. The sureties of the Recorder of Deeds are not liable for false searches.

At Nisus Prius. Opinion of Agnew, J., on demurrer.

The first three causes of demurrer are unimportant as they are all amendable, but the amendments should be made. The remaining four bring into view substantial defects. The first to be noticed is the manner of stating the plaintiffs. Kellogg was the person who obtained the recorder's certificate and made the first purchase under it. He sold to Wm. Mullison who afterwards sold to Anna Shott. Under the act regulating suits on official bonds the suit is in the name of the Commonwealth, and as many persons may be suggested plaintiffs who choose to join, but each must declare and assign breaches for his separate injury. Here, however, the pleader has suggested Kellogg as plaintiff for use of Mullison for use of Shott. Kellogg, in this suit, is the only plaintiff, while the others are merely persons to whom his right of action has passed. This being the suggestion of the plaintiff, it is plain that no injury sustained by either Mullison or Shott can be declared upon, for in

this form the last assignee merely takes what Kelogg may recover.

In one point of view this cause is also unimportant because is is clearly amendable by striking out the use and permitting the two last named to come in as plaintiffs in their own behalf, the act referred to giving the right of suggestion at any time before judgment. But this change in the relation of the parties from uses to plaintiffs, discloses the real vice of this declaration. The only damages averred are those arising upon the sale from Mullison to Anna Shott, who it is alleged paid $13,000 for the property upon the faith of the false certificate of the recorder of deeds. The declaration being amended, that is, Anna Shott being suggested plaintiff in her own right the question is at once presented, can she found an action against the recorder for damages upon a certificate of search given to Killogg, an antecedent purchaser?

The question is important, as in this city the custom is to pass the certificates of search of deeds, mortgages and judgments with the title papers, each subsequent purchaser taking the title upon the faith of the former searches down to the date of the certificate, and procuring new searches only for subsequent conveyances and liens. While it is important, still I think it is not difficult of determination. So far as the certificate is the evidence of the state of the public record this custom is well enough. A search once made by the officer under his official responsibility is in all probabilities correct and therefore may be relied upon without a new one. It is not often these searches are incorrect, otherwise actions upon false certificates would be more frequent, their rarity is the evidence of official correctness and fidelity; and therefore the certificate has all the force of evidence in the hands of subsequent purchasers, that it had in those of the first. But when you touch the official responsibility of the officer, you reach a different question. It is then not simply the evidence which the certificate affords, but the duty it involves.

What is this duty? It is, as the keeper of the record, to make searches for deeds and mortgages, and other recordable instruments at the instance of those who may apply therefore and pay him the fee, which the law allows him for the performance of the duty. The duty is specific to make it for him who asks for it and pays for it, and therefore has a right to the responsibility of the officer and to rely upon it. It is he who is deceived by the officer's false search because he alone stands in privity with him, by demanding performance of the duty and making compensation for it. The emoluments of the office constitute the consideration of undertaking the responsibility. Who would accept the office and perform such duties involving such heavy liabilities, if he were to be allowed no equivalent. The officer who makes a search stands, in reference to its correctness, in the attitude of an insurer, and his fee represents the premium. To make him responsible to every new purchaser without a fee would be as inequitable as to hold an insurer liable upon a new risk without a new premium.

But when we come to analyse the transaction, we will find it impossible to carry on the notion of continuing liability. The injury arising from a false certificate of search, undoubtedly falls upon the person who obtains and acts upon it; because the fact which causes his injury, to wit, the undisclosed deed or mortgage precedes his purchase. It is the title *he* purchases which it affected. As it is he who suffers by the unrevealed conveyance of incumbrance, the right of action is personal to himself. It does not run with the land, but passes to his personal representative. If he sell with covenants for title, or for quiet enjoyment, his own liability to his vendee requires him to retain it, to make good his own loss. If not answerable to his vendee because he has given no covenant for title, the rule *caveat emptor* which protects him, also protect the officer who is responsible to him. The action being his own he may also end it by accord and satisfaction or by release.

Carry this further. He can recover for the injury which leads him to accept a worthless title or an incumbered estate. This is clear. His damage is the cost of the worthless title, (the case laid in the declaration) which is the price paid. To-morrow he sells for twice as much; and the next day his vendee sells for three times the first sum, which price will be the real damage. If the first one being paid by the recorder, release him, will that satisfy the injury, or will it be only *pro tanto*, leaving the second to run, and on his payment and release, leaving the third what shall remain? This is a sad jumble of interfering rights, growing out of continuing liability. But it is said the recorder may take up his certificate on payment. But this will not always protect the subsequent purchase, which may have taken place before the discovery of the secret deed or mortgage so that the right of action has vested, if vest it can. A continuing liability beginning like a snowball, increases like an avalanche overwhelming and destroying the unfortunate incumbent of office. Now while he must bring fidelity and diligence to the execution of his duties, the law owes him protection against needless severity and hardship. It is much less hardship to require a new search for every purchaser than to entail upon officers, the accumulated burthens of independent transactions, and adventitious advance of the prices of real estate.

If instead of continuing liability, we proceed upon the ground of successive liability to each new purchaser, the case runs counter to the objections before stated. The officer owes but one duty which is to him who employs and pays him. If a new liability arise, it is because of a new duty which cannot take place without renewed privity and renewed compensation. It encounters a further objection. The new duty at each successive purchase, gives rise to a new cause of action, which runs only from its breach, and cannot occur till the new purchase is made. This may be twenty years after the date of the certificate. But this is repugnant to the statute of limitations which bars actions against sureties in official bonds after seven years from the injury, and that must arise during the official term.

It cannot be the case that a right of action follows the floating certificate down the stream of title, because there is no adequate compensation for this tremendous risk, there is no privity of duty between the officer and those coming after the person procuring the search,

there is a compounding of several injuries, where but one can naturally exist. and because it is clearly harsh, unjust and impolitic.

If any one will have, in addition to the satisfactory evidence which the certificate affords, the personal responsibility of the officer, let him ask for it and pay for it by obtaining a new search. There is good reason for this, a new search may reveal the before-undiscovered incubus upon the title, freeing the officer from further liability, and applicant from injury and litigation. Give the officer a locus, and the citizen the means of escape from undesired difficulty.

There is an objection not contained in the grounds of demurrer fatal to this action, if the condition of the bond be correctly set out in the declaration. The only condition recited is to "deliver up the records and other writings belonging to the said office, whole, safe and undefaced to his successor therein, according to law." This covers only the public interest but provides for no protection against private injury. The liability of the sureties is strictly legal, and cannot be extended beyond the terms of the condition.

Judgment for the defendant on the demurrer.

## GENERAL CORRESPONDENCE.

*Service of papers in County Courts—Toronto agents—When service sufficient—Setting aside.*

TO THE EDITORS OF THE LAW JOURNAL.

GENTLEMEN,—Is the service by the plaintiff's attorney, of a notice of trial in an action in a County Court, upon the Toronto agent of the defendant's attorney eight days before the sitting of the court at which the action is to be tried, a sufficient service of notice of trial, or must the service in the County Court be upon the attorney himself?

If the service is not sufficient, has the County Court judge power to set the notice of trial aside, on the ground that service on the defendant's attorney was not effected eight days before court?

Yours truly,

A SUBSCRIBER.

St. Catharines, March 23, 1865,

[It seems to us that sec. 61 of Con. Stat. U. C. cap. 22, which is as much applicable to County Courts as to the Superior Courts, answers the question of our correspondent. It enacts that if the attorney of either party do not reside or have not a duly authorised agent residing in the county where the action has been commenced, then service may be made upon the attorney wherever he resides, or upon his duly authorised agent in Toronto. We apprehend that where the attorney to be served resides in the county where the action is commenced, he should himself be served. So if he have an agent in that county. Otherwise, according to the act, the service may be on the attorney wherever he resides, or on his Toronto agent. If the service be irregular, the County Court judge of course has power to set it aside.—EDS. L. J.]

*Assessment Act—Liability of goods to distress for taxes—What goods.*

TO THE EDITORS OF THE LAW JOURNAL.

GENTLEMEN,—A. occupied B.'s town lot, paying for the use of it simply the taxes. In August last A. (after having the lot assessed in his name) removed, carrying with him everything moveable thereon.

Now, the collector says he has no authority to seize A.'s property in other parts of the municipality, because the removal took place before he received the roll. Can he seize?

An answer in your April number, if possible, will oblige

SEVERAL READERS.

Collingwood, March 23, 1865.

[In case any person neglects to pay his taxes for fourteen days after demand, the collector is empowered to levy the same with costs by distress of the goods and chattels of the person who ought to pay the same, or of any goods or chattels in his possession, where ever the same may be found within the county within which the local municipality lies. The fact of removal from the lot assessed, before or after the receipt of the roll by the collector, does not in any manner, so far as we understand the act, affect the right of the collector to distrain, so long as the goods and chattels liable to distress are within the county, and in the possession of the person who ought to pay the taxes at the time of the distress.—EDS. L. J.]

*Equity jurisdiction of County Courts—Tariff—Amendment.*

TO THE EDITORS OF THE LAW JOURNAL.

GENTLEMEN,—There is one thing to which your attention, as well as that of the profession generally, ought to be called, and that is, the miserable tariff provided for costs on the Equity side of the County Court.

The effect of that tariff is to destroy all equity practice in this court. The fees pro-

vided are not so good as the fees of a suit in the Division Court. I do not know what was the object of thus placing these fees so very low, but I do know that the result of it is to work an injury to the country by preventing the doing of any business on that side of the County Court. I can scarcely believe that this was the design, but such is the effect. If the fees were upon the same scale as those on the Common Law side of that court, no one would complain.

I hope, Messrs. Editors, that you and other members of the profession will use your influence to bring about a much desired change in the tariff of fees on the Equity side of the County Court.

Equitas.

March 30, 1865.

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[It has often been a subject of remark, that if those who framed the Equity tariff had desired to nullify the Act giving equitable jurisdiction to County Courts, they could not better have accomplished that purpose than they appear to have done by a tariff which pleases none and displeases all. Either from this or some other cause, the act has become almost a dead letter. It was an act of good promise, and we are sorry to find it so much neglected. The cause may be, and probably is, the tariff, which our correspondent describes in befitting terms. He has done well publicly to call attention to it, and we trust that he has not done so in vain. Let practitioners agitate the matter, and the remedy, we have reason to believe, will be found.—Eds. L. J.]

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*Profession of the Law—Numerical increase—Remedy proposed.*

To the Editors of the Law Journal.

Gentlemen,—A good deal has lately been said in your journal about the necessity of adopting some plan to discourage the present rapid increase in the numbers of the legal profession in Upper Canada. That something ought to be done, is felt by all; but what that something is, is the question.

It appears to me that, so far, the attention of your correspondents has been directed to the adoption of the best method to prevent the increase of barristers alone. Here is where they err. The object should be to prevent the immense increase of attorneys. Where there is one barrister, there are very nearly ten attorneys. The attorneys do all the business of bringing suits, and it is they alone who are responsible for the evils of which the public complain.

I think I can suggest a very easy remedy. Compel all persons, before they enter upon the study of the law, to go up and pass the same examination, and to pay the same fees, as are now required from those who are entered upon the books of the Law Society, and who desire to be admitted as barristers; and compel all to pass a similar examination, and to pay such fees, as are provided for call to the bar; and I venture to say that the result will be all that can be desired.

At present any one, no matter how unqualified or unfit, can become an attorney-at-law, by serving five years under articles, and passing the simplest kind of examination—so simple as to be almost useless. Raise the standard of examination, and make all submit to it alike. If that be done, there will be fewer members of the profession of the law.

A Subscriber.

March 30, 1865.

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[We can do no more than submit the foregoing for the consideration of those whose duty it is to deal with the matter in hand. One thing is plain, and that is that the desire for a change of some kind is very general. Much will depend upon the wisdom of those who shall have the direction of it. It is to be hoped that the change will be for the better.—Eds. L. J.]

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## REVIEWS.

A Synoptical Index of the Consolidated Statutes of Canada and of Upper Canada, with Notices of the later Acts which affect them, including the Session of 1864. By John Webster Hancock, LL.B., Barrister-at-Law, Berlin, C. W., Author of a System of Conveyancing, &c. Toronto: Published by W. C. Chewett & Co., and for sale by Rollo & Adam, and all booksellers. 1865. Price $5.

We look upon this as the most useful legal compilation that has recently been published in Canada. We have been expecting it a long time, and had nearly despaired of ever seeing it.

Much was done towards aiding the administration of justice when the Legislature, in 1860, caused the Public Statutes of Canada and of Upper Canada to be consolidated in

separate form. But a consolidation however good, with an imperfect index, was to us as a casket without a key. Though the work of the consolidation of the statutes was all that could be desired, the index to each volume was execrable. So bad have we found it that in many instances we have had to consult the repealed Statutes in order to get information in the Consolidated Statutes, which a good index should have afforded at a glance. We have never ceased to think that those concerned in the consolidation of the Statutes were greatly to blame in not securing the services of a proper person to index the result of their labors.

It is not every man who can compile a good index. Even the best authors are sometimes the least able to do so; but most certainly the gentleman who prepared the index of the Consolidated Statutes was wholly unequal to the task—and the badness of its execution has been the cause of incalculable loss of time to those obliged to consult his (so-called) index.

What the Legislature ought to have done as a public work is now well done by private enterprise. We have carefully inspected Mr. Hancock's Index, and have so far been much pleased with the result. We look forward to considerable saving of time whenever necessary to consult the Consolidated Statutes of Canada or of Upper Canada, or statutes since passed affecting them, up to 1864 inclusive. We shall cease to approach the Statutes with dislike. The work does as much credit to the enterprising law publishers as it does to the careful and reliable author. The price, $5, is really nothing to a man in respectable practice. The time saved in one week—perhaps in one day—by the use of it will be more than compensation for the expenditure. The volume contains nearly 500 pages octavo, well printed, and is substantially bound.

All who have occasion to make use of the Consolidated Statutes either of Canada or of Upper Canada should be provided with a copy of this Index. Indeed, the Legislature should be called upon to make reparation for its past omission either by purchasing a large edition of the work before us for gratuitous distribution to magistrates and others entitled to receive, and who have received gratuitously, the Consolidated Statutes, or by making an appropriation which would enable the author to dispose of his present edition at a reduced price, so as to be within the reach of all to whom the Index is necessary in the discharge of professional or public duty.

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The American Law Register. Philadelphia: D. B. Caufield & Co. Chicago: H. N. Hibbard & Co.

It is with great pleasure that we number this well known and able periodical among our exchanges. It has now been in existence for thirteen years, and has acquired a reputation which entitles it to rank among Law periodicals. The Editors are men of mark, viz., Hon. Isaac F. Redfield, Boston; Prof. Theodore W. Dwight, New York; Prof. Amos Dean, Albany, N. Y.; Hon. John F. Dillon, Davenport, Iowa; John A. Jameson, Esq., Chicago, Ill.; James P. Mitchell, Esq., Philadelphia. The number before us (April, 1865, or No. 7, vol. 4, N. S.; old series, vol. 13) opens with a well written paper on "Usury," which we may hereafter, with the permission of the Editors, transfer to our columns for the information of our readers. Then follow recent decisions in the Superior Courts of Iowa, Vermont, Pennsylvania and Nova Scotia, the latter being a decision on the question as to sufficiency of tender of payment in United States treasury notes, to satisfy a money demand under a lease made in Nova Scotia, payable in "dollars and cents of United States currency." It being shewn that the lease was made on the 4th May, 1860, two years before the act of Congress was passed making treasury notes a legal tender, the court very properly held the tender insufficient. Such was the ruling of our Court of Common Pleas (13 U. C. C. P. 350). But had the contract been made after the act of Congress, and at a time when treasury notes became a legal tender, and been payable either in "dollars and cents of United States currency," meaning simply United States money, or been payable in "dollars" at some place in the United States, we apprehend the *lex solutionis* would be held to govern, and treasury notes be a legal tender. Such is the conclusion which we draw from our own cases of *Niagara Bridge Company* v. *Great Western Railway Company*, 22 U. C. Q. B. 592; *Crawford* v. *Beard*, 13 U. C. C. P. 35; same case, 14 U. C. C. P. 87; *Grant* v. *Young*, 23 U. C. Q. B. 387; *Wood et al.* v. *Young*, 14 U. C. C. P. 250.

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| Christopher Ephraim Lee | Barrie. |
| R. J. Earl | Chatham. |
| H. N. Boxer | Montreal. |
| Michael Marrion | Lime Lake. |

## APPOINTMENTS TO OFFICE.

### POLICE MAGISTRATE.

JAMES WEYMS, Esquire, to be Police Magistrate, Town of Brantford. (Gazetted April 22, 1865.)

### NOTARIES PUBLIC.

DAVID SMART, of Port Hope, Esquire, Attorney-at-Law, to be a Notary Public in Upper Canada. (Gazetted April 1, 1865.)

EDWARD TAYLOR DARTNELL, of L'Orignal, Esquire, Barrister-at-Law, to be a Notary Public in Upper Canada. (Gazetted April 1, 1865.)

DANIEL SHOFF, of McGillivray, Esquire, to be a Notary Public in Upper Canada. (Gazetted April 1, 1865.)

DUNCAN C. MACDONELL, of Whitby, Esquire, to be a Notary Public in Upper Canada. (Gazetted April 1, 1865.)

WILLIAM TORRANCE HAYS, of Goderich, Esquire, Attorney-at-Law, to be a Notary Public in Upper Canada. (Gazetted April 1, 1865.)

JOHN EDWIN FAREWELL, of Oshawa, Esquire, Barrister-at-Law, to be a Notary Public in Upper Canada. (Gazetted April 1, 1865.)

DONALD SUTHERLAND, of Thamesford, Esquire, to be a Notary Public in Upper Canada. (Gazetted April 22, 1865.)

GEORGE PALMER, of Guelph, Esquire, Barrister-at-Law, to be a Notary Public in Upper Canada. (Gazetted April 22, 1865.)

### CORONERS.

THOMAS JOHN YORK, Esquire, M.D., Associate Coroner, County of Wellington. (Gazetted April 1, 1865.)

ALEXANDER JAMES McMASTER, Esquire, M.D., Associate Coroner, United Counties of York and Peel. (Gazetted April 1, 1865.)

CHARLES TAIT SCOTT, Esquire, Associate Coroner, United Counties of Huron and Bruce. (Gazetted April 1, 1865.)

GEORGE WILSON, Esquire, M.D., and DAVID HOWARD HARRISON, Esquire, M.D., Associate Coroners, County of Perth. (Gazetted April 22, 1865.)

JOHN CASCADEN, Esquire, M. D., Associate Coroner, County of Elgin. (Gazetted April 22, 1865.)

EDWARD HORNIBROOK, Esquire, Associate Coroner, County of Perth. (Gazetted April 22, 1865.)

## TO CORRESPONDENTS.

"A Subscriber" — "Several Readers" — "Equitas" — "A Subscriber"—under "General Correspondence."

## DIARY FOR JUNE.

4. SUN ... *Whit Sunday.*
5. Mon ... Recorder's Court sits. Last day for notice of trial [for Co. Ct.
11. SUN ... *Trinity Sunday. St. Barnabas.*
13. Tues ... Quar. Sess. and Co. Ct. sitt. in each Co.
18. SUN ... *1st Sunday after Trinity.*
20. Tues ... Accession Queen Victoria, 1837.
21. Wed ... Longest Day.
22. Thurs.. Sittings Court of Error and Appeal.
24. Sat .... *St. John Baptist.* Midsummer Day.
25. SUN ... *2nd Sunday after Trinity.*
29. Thurs.. *St. Peter.*
30. Frid.... Last day for County Council finally to revise Assessment Roll.

## NOTICE.

*Owing to the very large demand for the* Law Journal *and* Local Courts' Gazette, *subscribers not desiring to take* both *publications are particularly requested at once to return the back numbers of that one for which they do not wish to subscribe.*

THE

# Upper Canada Law Journal.

JUNE, 1865.

## BRITISH OATHS' ACT.

Notwithstanding the numerous reformations and amendments that have of late years been made in the law of evidence, both in this country and in England, there is, at least, one provision remaining, which does not redound to the credit of its original introducer, or of those who at a subsequent period effected some very important and beneficial changes in this important branch of the law.

The statute alluded to was not the production of our own legislators, who, being only Provincials, might be expected to do childish and thoughtless acts, but of that full-grown and almost immaculate assemblage, the House of Commons in England.

In the year 1835 an act was passed by the Imperial Parliament, entitled, "An act to repeal an act of the present session of parliament, intituled, an act for the more effectual abolition of oaths and affirmations taken and made in various departments of the state, and to substitute declarations in lieu thereof, and for the more entire suppression of voluntary and extra-judicial oaths and affidavits, and to make other provisions for the abolition of unnecessary oaths." (5 & 6 Wm. IV. cap. 62.)

With the expediency or propriety of substituting declarations for oaths and affidavits, in England or any other country, we have, of course, nothing to do. The inhabitants of each country must be the best judges of what is suitable to themselves. For our part we have not yet come to the conclusion that a simple declaration, made without the sanctity of an oath, would conduce to public interests, or indeed to the advancement of public morality; though this latter is a more debatable question, and there is much force in the argument of those who contend that persons, who are long in the habit of taking what are in most cases merely formal oaths, such for instance as custom-house oaths, become indifferent and careless as to the sacred nature of the obligation they take upon themselves. But whilst we might admit that a change in this respect would be grateful to the feelings of many right-thinking men amongst us, we may naturally demur to another country, even though it be our own mother country, attempting to compel us to receive in our courts *as evidence*, the simple statement of a witness subject to, and fearful of no searching cross-examination, signed before some unknown magistrate, and uncontrolled by even the semblance of any thing that might remind him that his statement, whether true or false, was the subject of divine omniscience.

One very noticeable inconsistency of the act is, that whilst it enacts, that in any suit brought in any colony for or relating to any debt or account wherein any person residing in Great Britain and Ireland shall be a party, or for or relating to any lands, &c., situate therein, it may be lawful for the plaintiff, or defendant, or any witness, to verify or prove any matter relating thereto by a declaration in writing to be made before a justice of the peace, &c., (sec. 15) it carefully provides in another place (sec. 7) that nothing in the act shall apply to any oath or affidavit which is required to be taken in any suit or judicial proceeding in any court of justice in Great Britain or Ireland.

The utter want of caution, and the carelessness evinced, and the inconsistences apparent in this act so far as it applies to the colonies, are most able and fully commented upon in the judgment of the late Sir John Beverly Robinson, in *Smith* v. *McGowan*, 12 U. C. Q. B., 287, but like the present Chief Justice of Upper Canada, at that time sitting as a puisne judge in the Court of Queen's Bench, we do not "desire to weaken by further observations

the effect of the temperate but clear and decided manner in which the objections to the statute have been pointed out." Those interested in the subject will there find it much better and more clearly discussed than we could do it, and to this judgment we refer them for further information.

The fact of this statute remaining so long unrepealed may probably be attributed to the infrequency of its use, but this is no argument for its longer continuance; and to conclude in the words of the present Chief Justice, "In any point of view the enactment is at variance with the rights of self-government possessed by the North American Provinces, and I sincerely hope may be repealed."

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## PRACTICE OF BAILING BY JUDGES IN CRIMINAL CASES.

On page 165 of Vol. 7 of the *Law Journal* will be found an article on the law and practice of bail in criminal cases, to which we refer our readers in connection with *The Queen* v. *Chamberlain et al.*, published in another place in the present number. The writer of that article suggested as allowable the practice which has been sanctioned by Mr. Justice Wilson, in the case named, that is to say, to have the depositions certified by the County attorney; and expressed his belief that the better course in all cases would be (as suggested in that article) to obtain copies from that officer, rather than from the committing justice. We subjoin an extract therefrom on this point.

The writer, after mentioning that the procedure is not traced out in the particular enactment, goes on to say—"but enough may be collected from the several enactments bearing on the subject, to show the proper practice in such cases. Suppose, then, a practitioner instructed to apply to the county judge for an order to bail a party committed for a crime. The first step will be to procure certified copies of the examinations and papers upon which the judge is to act. If the party charged be actually in gaol, it may be assumed that the papers are filed with the County attorney; for section 39 of the Consolidated Act, before referred to (Con. Stat. C. ch. 102), and section 9 of the Local Crown Attorney's Act (c. 106, U. C.), require the depositions and papers to be 'delivered to the County attorney without delay,' and so in respect to coroners, by section 62 of the first named act. The words 'without delay' must be taken to mean without unreasonable delay, and in practice the papers are usually sent by the next mail, or are at once sent in an enclosed packet by the constable intrusted with the execution of the warrant of commitment, to be by him delivered to the County crown attorney, when he lodges his prisoner in gaol. But if on inquiry it is found that the committing magistrate has not transmitted the papers to the County attorney, that officer would doubtless call upon the magistrate at once to forward them; and that without prejudice to any proceeding that would lie against the magistrate for default in not obeying the requirements of the statute. In some cases it may save time to apply directly to the committing justices; but, unless in very urgent cases, it is better to obtain the certificate from the County crown attorney—for unless every thing is in form the papers may require to be again sent to the committing magistrate for correction, and, in any case, notice will probably be required to be given to the County attorney."

As remarked by Mr. Justice Wilson, it would be impossible for the committing magistrate, after he has complied with the law in transmitting the papers to the County attorney, to certify in the manner required by the act; and, "in favor of liberty," the learned judge made the order to bail on the depositions transmitted and certified by the County attorney.

But after all, the 63rd section of the Consolidated Satutes of Canada only provided an additional mode of verifying the depositions, &c., on the application to a judge to bail, and the judge might, we take it, act upon any proof which satisfies him, under the extensive powers given by the 54th section of the same act; and the official certificate of a County attorney is at least as reliable as the like certificate from a justice of the peace.

There are, however, two provisions bearing on this question which do not appear to have been mentioned by counsel in the case of *The Queen* v. *Chamberlain* Section 5 of ch. 80, Con. Stat. Can. provides that "in every case in which the original record could be received in evidence, a copy of any official or public document in this province, purporting to be certified under the hand of the proper officer or

person in whose custody such official or public document," &c., shall be receivable in evidence of any particular in any court of justice, or before any legal tribunal, &c.; and section 60 of Con. Stat. C. ch. 102 enacts, that after examinations taken before magistrates have been completed, and before the first day of the court to which the prisoner is committed to be tried, &c., the prisoner *may demand from the officer or person having custody of the same* copies of the depositions on which he has been committed, &c., on payment of a reasonable sum for the same, not exceeding five cents for each folio.

Under one or both of these enactments the judge might well receive certified copies of the depositions from the County attorney, if express authority were needed for receiving that species of evidence of depositions taken in the charge upon which a prisoner applies to be admitted to bail.

## OVER-HOLDING TENANTS.

It might naturally be supposed by those taking a cursory glance at the statutes of 1864, that these disagreeable people had, after all that has been said about them, been effectually provided for by the legislature. It was perhaps thought that giving jurisdiction in the premises to the county judges, was all that could possibly be necessary. This, of course, was a high compliment to them, for which, as for many other favours of the same kind, they are doubtless very grateful.

It will be seen by comparing the late act (27 & 28 Vic., cap. 30.) with the 63rd sec. of the Ejectment Act, (Con. Stat. U. C., cap. 27, sec. 63, taken from 4 Will. IV., cap. 1, sec. 53) that the first and second sections of the act first referred to are copied, almost word for word, from section 63 of the Ejectment Act. Now these sections define the class of tenants that come within the provisions of the act; and therefore the decisions on the earlier statute on this point, apply equally to the later one. But these decisions, which were collected and commented on in an article on this subject in a previous volume,* shewed various defects in the law as it then stood, and which therefore still exist.

These cases shew that the operation of the act is very limited. It does not apply to tenancies at will, to monthly tenancies, to tenances from year to year, nor to cases where a term is forfeited by breach of covenant; in fact the act is confined to cases where the tenant holds over after the expiration of a term certain, created by the contract of the parties, and becomes a trespasser and liable to be ejected without notice or demand.

It is a pity that this was not looked to when the last enactment was introduced. We did our duty in the premises by calling attention to the defects in the then existing law. Perhaps the next law-maker that tries his hand on the law of landlord and tenant, will take the hint and be more successful.

* 10 U. C. L. J., 1.

## THE LOWER CANADA LAW JOURNAL.

It is proposed, in Montreal, to issue on 1st July next, a legal periodical under the above title, "to take somewhat the same position" there "that the *Upper Canada Law Journal* holds in the Western Province."

We shall be glad to welcome this periodical, and hope for its success. We do so without in the slightest degree reflecting upon the *Lower Canada Reports*, or the *Lower Canada Jurist*, both of which publications are of a high character. But devoted as they are exclusively to reports of decided cases, their ambit is necessarily limited.

It is intended that the *Lower Canada Journal* shall contain original articles on subjects interesting to the profession, important proceedings and decisions of all the courts, civil and criminal, selected matter from English and American periodicals, miscellany of intelligence interesting to the profession, and be a medium of communication between members of the profession.

The publication will be a quarterly one, and the price only $2. But in order to be of much service to the profession as a medium of communication and miscellany of intelligence, it ought at least to be a monthly. This we presume it will soon become, if the project receive the support it deserves.

We have received a copy of Mr. McMillan's "New Manual of Costs, Forms, and Rules in the Common Law Courts of Upper Canada." It appears to be a most useful little book, containing 142 pages. We shall refer to it again in our next issue.

## LAW SOCIETY EASTER TERM, 1865.

### CALLS TO THE BAR.

The following gentlemen, during this term, obtained the necessary certificates qualifying them for call to the bar, viz:—

J. Hutcheson Esten, J. C. Hatton, G. Y. Smith, W. C. Loscombe, Sutherland Malcomson, W. Sidney Smith, A. S. Hardy, C. S. Corrigan, John McIntyre.

### ATTORNEYS ADMITTED.

The following gentlemen were, during this term, sworn in as Attorneys and Solicitors in the several courts of law and equity in Upper Canada:—

Elmes Henderson, G. A. Holmes, James O. Loane, P. F. Walker, Frederick W. Campbell, Stephen F. Griffith, W. Sidney Smith, G. V. Price, Alfred Hoskin, C. S. Corrigan, John McIntyre, R. H. Haycock. D. B. Maclennan, Sutherland Malcomson, S. P. Yeomans, J. Watson Hall, Benjamin Cronyn, Charles D. Dallas, W. J. White, John Farley, Alfred McDougall, Samuel Wickson, Nicholas Murphy, W. B. Simcoe Kerr, Henry Holland.

### NOTICES FOR NEXT TERM.

Fifty-seven gentlemen have given notice of their intention to present themselves for examination for call to the bar next term.

Fifty-one gentleman have given notice for next term for admission to the Law Society as students.

[These figures are more eloquent than words could be. *Quære*—Why do people insist upon entering an expensive and laborious profession, by which the vast majority of them will not be able to make "salt for their porridge."]

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We have much pleasure in directing the attention of those whom it may concern, to the professional card of Mr. Holcomb, which will be found in our advertising columns. Previous to his commencing the practice of his profession in New York, he graduated in the Toronto University, and studied in a law office here. Having been a pains-taking and industrious student, we have no doubt that business entrusted to his care will be properly attended to, and his knowledge of Canadian law will be especially useful in matters of business sent to him from this country.

## SELECTIONS.

### QUACKERY.

The conviction of Wray *alias* Henery aroused the virtuous indignation of the British press to a degree that is inexplicable, as the offence of which he has been found guilty has been known to have been committed daily by the hundreds of quacks who carry on their nefarious but profitable practice in London and every town in the kingdom, and as the proprietors of the newspapers that have been loudest in his condemnation, and in the expression of indignation, have not hesitated to give to his advertisements, and those of others of the same class, a place in their pages. How few of our daily papers can be safely admitted into the family circle, owing to the highly objectionable nature of the advertisements of these quacks, by which alone they are enabled to live. If their advertisements were refused admission in the newspapers, half their trade would be gone. It is said that one London quack alone spends £10,000 a year upon his advertisements. This circumstance is itself enough to show how profitable a business this must be; and we recently heard of a case which explains the manner in which it is made so.

A nervous gentleman—so runs the tale—was induced to consult one of these fellows on a subject of extreme delicacy; the quack, seeing with whom he had to do, left the room mysteriously, and returned with a glass of stagnant water, into which he made this poor nervous man look with a magnifying glass, and, perceiving therein all kinds of creeping things, he became very much alarmed. The quack, seizing the opportunity, assured his patient that what he saw was the cause of complaint, and that there was no man in London able to cure him but himself, and he refused to prescribe until he was paid £500, and a cheque was immediately drawn for the amount. How he worked upon the nervous fears of this poor man can well be imagined, into whose purse he contrived, there can be little doubt, to dip still deeper.

Now, we do not imagine that the refusal of their advertisements would absolutely deprive these gentry of the publicity which is essential to them, but it would deprive them of that kind of recommendation which an advertisement in a respectable newspaper conveys to the mind of the ignorant and unreflecting who very often imagine that the proprietor of a high class newspaper would not admit into his columns an advertisement if he did not know something of the character of the advertiser. The description of persons fitted to be their victims being very well known to them, and their whereabouts, in whatever locality they are to be found, the post will be made the medium of conveying their filthy advertisements to their dupes. But then this mode of advertisement is within the grasp of the law.

There is another mode of advertisement to which they resort—viz., the distribution of their works at the public museums, to the annoyance and disgust of those who frequent our leading thoroughfares. This too, can be suppressed by the strong arm of the law. Surely that which Lord Campbell's Act has done with regard to obscene prints, can be done in the case of obscene publications, and the exhibitions of loathsome and disgusting figures and busts.

No quack is permitted to practise in France. When a man is about to commence the practice of medicine in any town there, he is obliged to present to the mayor, or other authority of the town, his diplomas, and if they are not *en regle*, he is not allowed to open his practice. The result is, that the public health and the purses of individuals are alike protected. Why cannot that which is done in France be done in England?

Doubtless there is this grave difficulty. According to our English mode of thinking, it is a serious and generally reprehensible interference with the liberty of the subject to extinguish a profitable trade, as this is, by legislative enactment, and there must be a very clear and cogent case of public benefit to compensate us for the sacrifice of personal liberty. "What," say the objectors, and not without force, "interfere with the right of a British subject to make any contract respecting his own pocket or health that in his own discretion he may himself please? Why should the Legislature interfere to protect men against their own folly? In seeking to suppress these publications, we may prevent scientific and medical inquiry? Why should we, in effect, revive an obsolete monopoly? This would be a gross, wanton, and un-English interference with that which is most dear to us—our free, uncontrolled, unfettered liberty;" and so forth. And it is not enough to say that similar objections may be and have been made to every project of reform brought under the consideration of the Legislature, and that, nevertheless, the reforms have been effected with advantage to the public. The real question at issue here is not whether the arbitrary suppression of these quacks would or not be a public benefit —no one can deny that it would be so, except the quacks themselves—but whether there is or not involved in this suppression a principle so fraught with danger as to render its adoption a greater evil than the nuisance it is desired to suppress. We cannot deny that to watch over the moral conduct of the population by law savours somewhat suspiciously of "paternal government." When the New England colonists declared adultery to be a crime punishable with the pillory, few people in this country doubted that, however excellent the morality of the statute in question, it was, practically, tyrannical. The question for us, then, is, have we, declamation apart, a right to prevent the open exercise of this most "noxious trade?" and we do not hesitate to say that we have.

Why is cheating a criminal offence? Because it is the duty of law to protect *property*, and cheating is an invasion of the rights of property. Is it, then, less the duty of law to prevent the weak and credulous from being deceived out of their health, which is property, and made furthermore to pay their money for that which cannot be taken to be "valuable consideration." Moreover, public decency is within the proper scope of the law, and these exhibitions and advertisements offend against public decency.

We admit freely that the task is not an easy one; but that is no reason why the attempt should not be made. Lord Campbell, in dealing with the Holywell-street obscenities, had similar difficulties to encounter, yet he made the attempt, and practically succeeded in his object.

The failure of the Medical Registration Act to suppress these evils is another proof of the necessity of a public prosecutor. The medical council consider, and probably with justice, that they are not called upon to institute proceedings, at their own risk, against quacks, who, by their assumed titles, hold themselves out to the public, who have no means of knowing better, as duly-qualified medical practitioners; and a kind of sanction is believed to be added to this representation by the appearance of their advertisements in respectable newspapers. As the law at present stands, there is no person or body compelled to prosecute.

The first step necessary sounds a strong one, but it is really right in principle. Let it be made a misdemeanour to assume the title or qualification of a medical man, unless authorised by the diploma of some recognised or legalised body or institution; then appoint a public officer bound to institute legal proceedings against all persons who violate the law in this respect, on a proper *primâ facie* case being shown; next prohibit any man from practising medicine in any place until his diplomas have been submitted to some magistrate, and a proper opportunity afforded for any person who may be so minded to test their genuineness. Let the presentation of a false diploma be declared a misdemeanour, and power of summary conviction (subject to the right of appeal) given to the magistrates; next the magistrates should be invested with power to close those museums that disgrace our leading thoroughfares, wherever found, and the provisions of Lord Campbell's Act should be extended to the circulation of those filthy publications.

This latter is, perhaps, the most difficult branch of the subject, because it may fairly be said, where is the line to be drawn between a scientific and a filthy publication. Many duly-qualified practitioners devote themselves to the treatment of what are called "secret diseases," and write skilful treatises upon

the subject. This is unquestionably so, and, while there is no necessity for the public to read these books, it is as absolutely necessary that the profession should be in possession of them as of any other medical works. They must therefore be advertised in the usual style in which other learned books are offered to the profession, but not otherwise; and it may well be confided to the authorised tribunals to deal with the authors of such works, and to say, under all the circumstances of each case, whether the advertisement was or not a legitimate one, and, if not, then to treat it as a misdemeanour.

It is not necessary here to enter into the details by means of which these provisions might be carried out, as they will easily suggest themselves to every experienced draftsman. Let the principle but be admitted that the men are public nuisances, as deserving of being stopped as unqualified solicitors or unauthorised brokers, and that the publications are an offence against public decency, and the rest will follow upon well-established precedents, almost without the necessity of consideration.—*Solicitor's Journal.*

## USURY.

The commodities and incommodities of usury have been fruitful themes of discussion among civilized nations time out of mind; and to-day, when unlimited wealth flows into the coffers of our merchants and bankers, the subject is necessarily exercising the minds of commercial men more than ever.

Originally, usury meant the taking of any money for its use: now, if money be paid for the use of money according to law, it is denominated *interest;* if more be taken it is *usury.*

Almost every nation has fixed by law a rate of interest for the use of money, upon the principle that it is easy for the lender to oppress the borrower.

The laws of Great Britain regulating interest have been quite various and significant. During the reign of Henry VIII., who became king in 1509, the rate of interest was legalized at ten per cent., and so continued, with but slight change, till James I. came to the throne (1603), when it was reduced to eight per cent. While England was a commonwealth it was only six per cent., which rate was re-enacted under 12 Charles II. (1661). By statute 12 Anne (September 29th, 1714), interest was again reduced to five per cent. From this statute of Anne, which provides that no person shall take, directly or indirectly, upon any contract, or loan of moneys, wares, or merchandise, above the value of £5. in the hundred for a year, and that any person taking more than that rate shall forfeit and lose treble value of the moneys and other things so lent,—the states of our Federal Union have carved their varied usury laws.

By Act 3 & 4 William IV., were exempted from the operation of usury, all bills or notes having "more than three months to run." Several modifications have occurred during the reign of Victoria, and by statute 1 Vict. 80, and 2 Vict. 37 (same as the statute of 7 William IV.), bills and notes are not effected by usury laws, if payable at or within twelve months, at legal interest, and not secured by mortgage, nor any contract for the loan or forbearance of money, above the sum of £10. shall be affected by the usury law: *Pennell* v. *Attenborough*, 4 Q. B. 867. And by statute 17 & 18 Vict. c. 90, all laws then in force upon usury were appealed.

The Sexviri of Athens were commissioners, who did watch to discern what laws waxed improper for the times, and what new law did in any branch cross a former one, and so *ex officio* propounded their repeal, upon the maxim *Salus populi suprema lex.* In the absence of this system with us, it devolves upon members of the legal profession more particularly to discern the real wants of society and the needs of commerce. While there should be no blind adherence to former rules, it is still necessary to exercise thought, foresight, and discretion, lest in a reform we "root up also the wheat."

As opinion obtains in many states, that money, being only worth what it will bring, should be regulated by voluntary contract of parties, subject to mercantile usage governing contracts of merchandise,—in fine, that the "tooth of usury" ought to be blunted, and as this prevailing sentiment has exerted, and must continue to exert, no inconsiderable influence upon adjudications, we purpose to devote some space to the discussion and review of two principal propositions: *First,* The present status of usury in the United States; and *Second,* The practicability of a reformation in the usury law of New York.

I. Strictly speaking, there are three requisites to constitute usury: 1. A loan, either express or implied; 2. An understanding that the money lent shall or may be returned; 3. That a greater rate of interest than is allowed by the statute shall be paid. It is clearly settled, also, that there must be an unlawful or corrupt intent confessed or proved, before a transaction will be pronounced usurious,—this is an important ingredient to constitute the offence.

1. It has been held in New York, see 5 Denio 236, that an usurious contract is incapable of ratification; but, said Balcom, J., in *Smith* v. *Marvin*, 25 How. Pr. R. 326, the assertion is not strictly true, for when a usurious loan is "voluntarily paid," the contract is certainly ratified, except as to the unlawful interest, which may be recovered back. Also, in the case of *Dix* v. *Van Wyck*, 2 Hill R. 522, Bronson, J., delivering the opinion of the court, observed, "Contracts affected by usury are not so utterly void, but that they may be ratified." Thus it follows, if a bor-

rower repay a loan which he might have avoided for usury, he cannot recover the money back again; though by the New York statute he may recover the excess which has been paid over lawful interest, within one year, as in Main and Virginia; or at common law at any time within six years.

In Massachusetts, it is held, that where there has been no payment, demand, or adjustment, in ascertaining the amount due on a note made payable with interest annually, simple interest only can be computed: *Hastings* v. *Wiswall*, 8 Mass. 455; *Ferry* v. *Ferry*, 2 Cush. 98; *Von Hemert* v. *Porter*, 11 Met. 210. The same rule has been followed in Maine: *Doe* v. *Warren*, 7 Greenl. 48.

What constitutes a voluntary payment of a loan? In the case of *Mumford* v. *Am. Life Ins. and Trust Co.*, 4 Comst. R. 463, it was held, that the payment of a usurious loan was not voluntary, if obtained by the lender out of collateral securities in his hands without the concurrence of the borrower.

2. *Of Contingent interest.* In ordinary transactions, if the gain to the lender, beyond legal interest, is made dependent upon the will of the borrower, as where he may discharge himself by a punctual payment of the principal, —as if I covenant to pay one thousand dollars one year hence, and if I do not then pay it, to pay five hundred dollars, or fifty per cent., being in the nature of a penalty for non-performance, it would not be usurious; as where there is no loan or forbearance there can be no usury,—and both parties must intend to provide for the payment of more than legal interest.

Thus, the Supreme Court of the United States held, in the recent case of *Spain* v. *Hamilton's Admin.*, 1 Wall. 604, that, where the promise to pay a sum above legal interest "depends upon a contingency, and not upon any happening of a certain event, the loan is not usurious." Nor will usurious interest be inferred from a paper which, while referring to payment of a sum above the lawful interest, is "uncertain and so curious," that intentional bad device cannot be affirmed.

It is clearly understood, that the essence of the contract of *bottomry* and *respondentia*, is, that the lender runs the risk, and is thus entitled to the marine interest. This mercantile rule is sanctioned either by usage or law in almost every country: Ord on Usury 24 to 48; *Thorndike* v. *Stone*, 11 Pick. 183.

There is a distinction made between such cases and those of personal risk of the debtors being able to pay; if anything is paid for such risk it is usurious.

3. *What interest vitiates a contract.* If interest be paid upon miscalculation, it does not render the contract usurious; but if taken through ignorance of law it would be, upon the familiar maxim, *ignorantia juris non ex cusat.*

It is not material in what form the contract is made, as the courts necessarily inquire into the real nature of the transaction, and no shift or device can protect it. A novel and interesting case was recently tried in Massachusetts, as to the liability of an executor who received unlawful interest innocently, which was reserved in a note due to his testator; and it was held that an action would not lie against the executor personally to recover back "threefold" the amount of usury so paid, although he be described in the writ as executor: *Heath* v. *Cook*, 7 Allen R. 59.

The question whether interest calculated by tables, upon the principle of 360 days being a year, is usurious, has been somewhat mooted. The New York courts have held that usury would attach: *N. Y. Firemen's Ins. Co.* v. *Ely*, 2 Cow. 678; *Utica Ins. Co.* v. *Tillman*, 1 Wend. 555; 8 Cowen 398. In Massachusets, however, they have decided, otherwise: *Agricultural Bank* v. *Bissell*, 12 Pick. 586; and also in Vermont: *St. Albans' Bank* v. *Scott*, 1 Vt. R. 426; *State Bank* v. *Cowan*, 8 Leigh. 253. Professor Parsons, in his excellent work on contracts, thinks this latter the better opinion. In Ohio, Iowa, and some of the other states, Rowlett's tables are authorized by statute.

New York and Massachusetts courts hold, that the taking of interest in advance by a bank, upon discounting notes, is not usurious; and the same opinion obtains in most states: *Mowen* v. *Hymers*, 12 N. Y. 230.

The rule for casting interest where partial payments have been made, is given in the case of *The State of Connecticut* v. *Johnson*, 1 Johns. Ch. R. 17, by Chancellor Kent, as follows:—"Apply the payment in the first place to the discharge of the interest then due. If the payment exceeds the interest, the surplus goes toward discharging the principal, and the subsequent interest is to be computed on the balance of principal remaining due. If the payments be less than the interest, the surplus of interest must not be taken to argument the principal; but interest continues on the former principal until the period when the payments, taken together, exceed the interest due, and then the surplus is to be applied towards discharging the principal, and interest is to be computed on the balance of principal as aforesaid." The renowned Judge Shaw, of Massachusetts, also declared this to be the proper rule in computing interest on partial payments.

In New York and the New England states it has been generally held, that new securities for old ones which are tinted with usury, are void with the old ones, and subject to the same defence.

But in Arkansas, where the plaintiff held several notes against the defendant, by agreement with him calculated interest due on each note and added it to the principal, took a new note for the whole sum bearing ten per cent. interest, it was held not usurious: 1 Eng. R. 463.

Whether a note valid in its inception, but

usuriously transferred by the payee or indorsee, is valid against the maker, has been variously decided. Lord Kenyon once held that such holder would be entitled to recover: *Parr* v. *Eliason*, 1 East 92: and in the case of *Campbell* v. *Read*, Martin & Yerg. R. 392, it was decided, that a note thus usuriously indorsed is valid as against the maker, in the hands of a holder *in good faith*. By Statute of Michigan, a holder of a bill or note in good faith, for valuable consideration, without notice and before maturity, shall be entitled to recover as if such usury had not been alleged and proved. This is a wise and equitable provision, working great benefit. New York repealed a similar provision by the amendment of 1837. There are but few cases in which a bill or note is void in the hands of an innocent indorsee for valuable consideration; such cases are, when the consideration in the instrument is money won at play, or it be given for a usurious debt. Notes given by a corporation, in violation of a statute, are void, even in the hands of an innocent holder: *Root* v. *Godard*, 3 McLean 102. In Mississippi a note was held to be void, where the signature was procured by fraudulent representations: *Dunn* v. *Smith*, 12 S. & M. 602. The payee of a note may transfer it at a discount exceeding the legal rate of interest; but where an indorser buys a note (valid in its inception), he can recover against the indorser only the sum paid with interest, though the full amount may be recovered against the maker: 15 Johns. R. 49; 4 Hill 472. If a usurious note be given up and cancelled, on the promise of the debtor to pay the original debt, with lawful interest, such promise would be binding; or if, when the interest is due and payable, or constitutes a then subsisting debt, the debtor ask to retain it, and agrees to pay interest upon the amount at the legal rate, the agreement is not usurious. Though a note be valid between the original parties, yet the indorser cannot sue the maker, if the indorsement was on an usurious consideration: Story on Bills 189; 1 Peters R. 37.

4. *Of usury in parties procuring loans.* Whether a bonus or premium is in the nature of a gift or promise at the time of the transaction, is a question of fact; if the undertaking assumes distinctness enough to become a contract for additional interest, the penalties of the usury law would attach.

A creditor in loaning money is not allowed to receive a compensation as for services in procuring the loan, nor make a condition of a loan that the borrower shall purchase a certain article; and whether the contracting parties sought to evade the statute is a question for the jury: Cowen's Treat. 63; 1 Johns. Ch. 6.

In New York city, very large business is done, by brokers in procuring money loans, and the question often arises what transactions are usurious. It is clear, that if a borrower pays a broker commission for his services in effecting a loan, in addition to paying lawful interest to the lender, it does not render the loan usurious, provided, the broker acts as agent merely and is not the person making the loan, and the lender receives no part of the commission: *Condit* v. *Baldwin*, 21 N. Y. 219; 21 Barb. 181; On the other hand, if the loan was in fact made by the person pretending to act as broker, his receiving a commission beyond simple interest, would constitute usury.

If a party guarantee or indorse paper for two months at two and a half per cent., it is not usurious (where there is no loan), for a man may sell his credit as well as goods and lands, dealing fairly, at any price he can get: *Reed* v. *Smith*, 9 Cow. 647; *Moore* v. *Howland*, 4 Denio 264; 1 N. Y. Legal Obs. 107.

If A. loans money to B. on simple interest, and on paying the same, B. expresses gratitude by a gift to A., either of money or goods, it would not be usurious; but if it be given in accordance with a previous promise, usury would attach.

The weight of authority recognises the principal, that none but parties or privies to an usurious contract can take advantage of it; and to avoid a security it must be shown that the agreement was usurious from its origin: *Nichols* v. *Fearson*, 7 Peters R. 103; *Rice* v. *Welling*, 5 Wend. 597; *Gardner* v. *Flagg*, 8 Mass. 101.

Usury, though commonly an unconsionable defence, is a legal one, and if proved, the courts must sustain it; if impolitic, the legislature alone can annul or repeal it. It is a defence which is not encouraged by the New York courts; and since the enactment of Laws of 1850, neither a corporation nor a receiver of one can maintain an action to recover back usurious premiums paid by it.—*American Law Register.*

(*To be Continued.*)

## UPPER CANADA REPORTS.

### COMMON PLEAS.

(*Reported by* S. J. VanKoughnet, Esq., M.A., *Barrister-at Law, Reporter to the Court.*)

### Baxter v. Baynes.

*Unstamped promissory note—27 & 28 Vic., ch. 4—Pleading.*

Where the defendant neither denied the making of the note sued on, nor pleaded the absence of a stamp, *Held*, that a defence on the latter ground could not be urged.

*Semble*, 1. That the only mode of raising the defence of the want of a legal stamp is by a plea denying the fact. 2. That such plea would be displaced by evidence showing that the instrument had been properly stamped at the time of signature, and initialed by the maker, but had been rubbed off, defaced, or improperly removed by some one else; that, on these facts being shewn, the note would not be void, and that the defendant would be relieved from the penalty under the act.*

[C. P., H. T., 1865.]

* That part of the case which bears upon the late Stamp Act only is given, the remainder not being of general interest.—Eds. L. J.

The declaration stated that the defendant, on 29th September, 1864, by his promissory note then over due, promised to pay Baxter & Galloway or bearer $550 with interest one month after date, and Baxter & Galloway delivered the note to the plaintiff, who became the bearer thereof, but the defendant did not pay the same, and the plaintiff claimed £175.

The defendant pleaded, 1. That he was induced to make the note by the fraud of the plaintiff. 2. That he made the note and delivered the same to the plaintiff without value or consideration for his so doing, or for his paying the amount thereof, or any part thereof, and that plaintiff always held the note without any value or consideration. 3. A plea of set off for money lent, money received, money paid, interest, and on an account stated.

The plaintiff took issue on all the pleas. The cause was taken down to trial at the last winter assizes for York and Peel before Mr. Justice Morrison, when a verdict was rendered for the defendant * * *

*Robert A. Harrison* obtained a rule *nisi* for a new trial.

*F. McKelcan* shewed cause. * * * The note was void for want of a stamp: 27 & 28 Vic. cap. 4, sec. 9. The defendant under that section would be liable to a penalty if he paid it without a stamp. Application was made at the trial for leave to add a plea raising this question, but was refused.

*Robert A. Harrison*, contra. * * * The making of the promissory note is not denied, and the defendant if intending to set up the illegality should have pleaded it under the 8th rule of Trinity term, 1856: *Lazarus* v. *Cowie*, 3 Q.B. 459; *Field* v. *Wood*, 7 A. & E. 114.

Richards, C. J., delivered the judgment of the court.

As to the want of a stamp, the 9th sec. of stat. 27 & 28 Vic., cap. 4, in effect provides, "if any person signs, becomes a party to, or pays any promissory note, draft, or bill of exchange, chargeable with duty under this act, before such duty (or double duty as the case may be) has been paid by affixing thereto the proper stamp or stamps, such person shall thereby incur a penalty of $100, and, except only in case of the payment of double duty as hereinafter mentioned, such instrument shall be invalid and of no effect in law or equity; and the acceptance of payment or protest thereof shall be of no effect, except that any subsequent party to such instrument or person paying the same may at the time of his so paying or becoming a party thereto pay such double duty by affixing to such instrument a stamp or stamps to the amount thereof. * * And such instrument shall thereby become valid, but no prior party who ought to have paid the duty thereon shall be released from the penalty by him incurred as aforesaid; and in suing for any such penalty the fact that no part of the signature of the party charged with neglecting to affix the proper stamp or stamps affixed to any instrument shall be *primâ facie* evidence that such party did not affix such stamp as required by this act."

The 8th rule of court of Trinity term, 1856, is, "In every species of action or contract, all matters in confession or avoidance, including not only those by way of discharge, but those which show the transaction to be either void or voidable in point of law on the ground of fraud or otherwise, shall be specially pleaded; *exampli gratiâ*, infancy, coverture, release, payment, performance, illegality of consideration either by statute or common law, drawing, endorsing, accepting bills, &c., or notes by way of accommodation, set off, mutual credit, unseaworthiness, misrepresentation, concealment, deviation, and various other defences must be pleaded."

It was provided by Imperial statute 31 Geo. III. cap. 25, sec. 19, to which Imperial statute 55 Geo. III. c. 184, sec. 8, refers, that "unless the paper on which a bill or note be written be stamped with the proper duty or a higher duty, it shall not be pleaded or given in evidence in any court, or admitted to be good, useful, or available in law or in equity." Sec. 17 of 3 & 4 Wm. IV. of Imperial Statute, cap. 97, provides that, "when the commissioners of stamps shall discontinue the use of any dies and provide fresh ones in lieu thereof, and give the proper notice thereof, the new dies shall be the only true ones for denoting the duty to be charged in any case to which the dies are applicable, and all deeds and instruments for the marking or stamping of which any such new dies shall have been provided, and which shall be engrossed, written, or printed on vellum, parchment or paper, stamped or marked with any other dies than the said new dies so provided, shall be deemed to be engrossed, written, or printed on vellum, parchment, or paper, not duly stamped or marked as required by law."

Under the English stamp act if an unstamped bill is read in evidence before an objection has been taken to it, the court will not allow the defendant to take the objection afterwards. In an action on a banker's draft the defence was that it was post dated. The effect of such post dating under 55 George III. cap. 184, is, that they do not come within the exception, as applicable to that description of drafts, relieving them from the necessity of being stamped unless properly dated; and the plea amounted to this that no banker's draft was made, the plea in fact being that the defendant did not make the said draft *modo et formâ* It was contended that the defendant ought to have pleaded this matter specially, but the court were of opinion that the defence could be set up under the general issue. In argument it was contended that from the facts shewn and for want of the stamp the bill could not be given in evidence, and that it would be improper to plead that a document was not evidence. *Field* v. *Woods*, 7 A. & E. 114, is authority on both points, and refers to the effect of the English stamp acts. In *Dawson* v. *Macdonald*, 2 M. & W. 26, the action was against the acceptor of the bill. The defendant obtained an order for an inspection, and also an order to plead several matters; viz., 1. He did not accept the bill. 2 & 3 Denying the drawing and endorsing. 4. A special plea, raising the defence that the bill was written on paper stamped with an old die, in contravention of Imperial statute 3 & 4 Wm. IV. cap. 97, sec. 17. Plaintiff obtained a rule to strike out the fourth plea, as the matter thereby pleaded might be given in evidence under

any of the other pleas, or at all events under the plea of non-acceptance. Parke, B., said, "the only consequence of wrong stamping is, the bill could not be given in evidence. * * * There can be no question this defence is admissable under the plea of non-acceptance."

In *M'Dowal* v. *Lyster*, 2 M & W. 52, the defendant in an action against himself, as the drawer of a banker's cheque, pleaded it was given to secure a gambling debt, and plaintiff was a holder of it without consideration. The defendant's counsel moved to add a plea that the cheque was drawn at a distance from the place where it was made payable, and was falsely dated in contravention of the provisions of 9 Geo. IV. cap. 49, sec. 15:

*Per curiam* —"The court will not interpose to assist the defendant in defeating an instrument, which he has knowingly executed in an illegal manner. If he wished to raise this defence he should have pleaded he did not make the cheque declared on."

In *Lazarus* v. *Cowie*, 8 Q B. 459, the action was by the endorsee of a bill against the acceptor. The defence set up was that the acceptance was for the accommodation of the drawer and without consideration; that before the endorsement to the plaintiff the drawer negotiated the bill for his own use and paid it when due, and it was re-delivered to him, and after it was due the drawer endorsed it to plaintiff without being restamped, or payment of any duty in respect of reissuing it; and that the plaintiff before endorsement to him had notice of the premises. On special demurrer it was held that the plea was good, and in giving judgment Lord Denman concludes as follows: "It is said, however, that the stamp acts do not make a bill without a stamp void, but only forbid its being received in evidence. That may be so in some cases, but the 19th section of statute 5 Geo. III cap. 184, expressly prohibits the re-issuing a bill of exchange which has been paid, and inflicts a penalty of £50 on any person doing it. A bill issued contrary to such a prohibition is certainly void."

The plaintiff's counsel in argument contended that the defect of stamp was only available by taking the objection at the trial, so as to cause the rejection of the instrument as inadmissable in evidence. According to the established practice, if the objection is not taken at the proper time the judge will direct the jury that there is a valid legal instrument giving a good cause of action.

I think by analogy these authorities shew that the defendant, under the pleadings, cannot properly set up thedefence that the note was not properly stamped, for he does not deny the making of the note; so that the fact being admitted on the record I fail to see under what plea the objection can be raised. According to the views expressed by Lord Denman in the case in 8 Q B., and under our 8th rule above quoted, the pleading of the want of a stamp would seem to be the most regular and convenient way of bringing up the defence. Suppose a proper stamp had been placed on the note at the time it was signed, and had been properly initialed by the maker, and had subsequently got rubbed off would the note be void? and if these facts were shewn in answer to a plea denying that the note was properly stamped, would they not displace the plea? That the absence of the stamp properly initialed is only *primâ facie* evidence in an action to recover the penalty would seem to imply that if the stamp had been properly placed thereon and defaced, and had been lost or removed by some one improperly afterwards, that the *primâ facie* case would be answered, and the defendant freed from the penalty. Without expressly deciding that the only mode of raising the question of want of a legal stamp on a bill or note is by pleading it, I have a rather strong opinion that such will be found to be the proper way of doing so.

Rule absolute for new trial.

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## White et al. v. Baker.

*Promissory notes payable in American currency—Plea. tender before action brought of smaller amount in Canadian currency, alleged to have been at time of tender equal to plaintiff's claim—Demurrer.*

To the first and second counts of a declaration on two promissory notes, dated respectively 11th September and 29th November, 1860, for the respective sums of $500 24 and $388 85, payable six months after date, the defendant pleaded that the notes were signed and entered into in the State of Illinois, one of the United States of America, to be paid, when due, in United States currency, and alleged a tender by defendant before action of $606 12 of lawful money of Canada, which was *at the time last aforesaid* equal to plaintiffs' claim, and a refusal by plaintiffs to accept same.

*Held*, on demurrer, plea bad; firstly, for alleging the amount tendered to have been equal to the plaintiffs' claim on the day of tender, before action brought, instead of at the time of making the notes sued upon, with subsequent interest, &c.; and, secondly, for alleging that the amount tendered was equal *to plaintiffs' claim*, instead of "equal in value to a certain sum of the currency of the United States," &c.; though, *semble*, this might be only ground of special demurrer.

[C. P., H. T., 1865.]

This was a demurrer to the first plea, which was pleaded to the first and second counts of the declaration.

The first count set out, that on the 11th September, 1860, the defendant, by his promissory note, promised to pay to the order of the plaintiffs $500 24, six months after date, but that he did not pay the same.

The second count was on a promissory note of the 29th October, 1860, for $388 75, similar to the note in the first count in other respects.

The plea was, that the promissory notes were signed and entered into by the defendant in the State of Illinois, one of the United States of America, to be paid, when due, in United States currency; and that before the commencement of this suit, to wit, on the 23rd November, 1864, the defendant tendered to the plaintiffs the sum of $606 12 of lawful money of Canada, which was at the time last aforesaid equal to the plaintiffs' claim in the first and second counts mentioned, and that the plaintiffs refused to accept it; and that defendant brought the same into court, &c.

The plaintiffs' grounds of demurrer were, that the sum tendered was a smaller sum than their claim; that it was not alleged to have been equal in value to the moneys in the first and second counts mentioned, at the time when they became payable; that no excuse was assigned for non-payment of the moneys when they became due, nor were any damages tendered for such non-payment.

*C. S. Patterson*, for the demurrer, referred to *The Niagara Falls International Bridge Company et al.* v. *The Great Western Railway Company*, 22 U C. Q B. 592; *Crawford* v. *Beard*, 13 U C. C. P. 35; *Judson* v. *Griffin*, 18 U. C. C. P. 350.

*S Richards*, Q. C., contra, referred to *Hutton* v. *Ward*, 15 Q. B. 26; Westlake on Private International Law, s. 232, as establishing that the plaintiffs were only entitled to recover the rate of exchange between the two countries at the time of the commencement of the suit, and not at the time when the notes became payable.

A. Wilson, J., delivered the judgment of the court.

It is not disputed that the *place* of payment is Illinois, where these notes were made and delivered, and that the rate of exchange must be governed by the rate prevailing between the *forum* in which the suit is brought, and the place where the money is to be transmitted; but it is contended that this rate is to be determined by that which prevailed at the time when the suit was brought and not at the time when the money became payable.

In the passage cited from Westlake it is stated: "But what if the question of place becomes complicated with one of time, by a variation of the rate of exchange between the date when the debt fell due and that when the action is brought? It is the latter period at which the exchange must be taken; for the only fixed element is the amount owing in the place where the debt is payable, increased of course from time to time by such interest as may there accrue upon it. What is due elsewhere fluctuates from *forum* to *forum*, and from moment to moment, being always the sum which, on being remitted, will produce that amount"

The assertion (for it is not reasoning), that there is "a fixed element of amount in the place where the debt is payable," is not correct, so long as it is claimed to be paid in a foreign currency, or, in other words, so long as it is subject to the laws of exchange; but even if there be such a fixed element of amount at the place of of payment, how can that apply more to the time of the suit than to the time of the payment?

If this had been a bill of exchange instead of a promissory note, the application of the rule of exchange to the time of the dishonor would have been more obvious.

Suppose, then, instead of this note, the plaintiffs, residing in Illinois, had drawn a bill upon the defendant in Canada, payable in Illinois, and he had accepted it: when that bill fell due and was dishonored, the plaintiffs, according to the Law Merchant, would have been at liberty to redraw upon the acceptor for the amount he ought at the time of the dishonor of the bill to have paid to the drawers or holder, together with the expenses and any additional exchange which was then prevailing between the two places. Why does not the same rule apply to a note as to a bill? The payee of a note relies upon the punctuality of the maker to redeem the paper, which the payee has probably negotiated; and if the maker do not redeem it, the payee in such a case must; and if he do, why should he not get from the maker the money which he, the payee, has been obliged to pay, and which the maker ought to have paid? Why, if the payee has paid $500, which was the whole claim on the note when it fell due, is he to recover what would at the time of his own payment be equal to $700, because one year after, when he brought his suit in a foreign country, his own currency had risen in value? Or why should the maker avoid paying the full $500, because the currency had in the meantime of his own neglect fallen? There is no reason why the one should thus gain, and the other should thus lose: they both contracted with relation to a particular time, which was the maturity of the note, and that, we think, must govern. Story's Conflict of Laws, ss. 309, 310, 311, and *Suse* v. *Pompe*, C. B N. S. 538, are full authorities for this opinion.

The plea is, however, open to objection, in alleging that $606 12 of lawful money of Canada was equal to the plaintiffs' claim; for their claim was really a question of law, to be determined by many considerations, and this the jury cannot try; but they could try whether $606 12 of the money of Canada was equal in value to a certain other sum of the currency of the United States; and this is the mode in which it should have been alleged. It is very likely that this is only cause special demurrer in this view of it; but in setting up the tender of a smaller sum as a discharge of the greater, it is made objectionable in substance.

Judgment for plaintiffs on demurrer.

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## Wilkins v. Row.

*Injury resulting from the clearing of land—Refusal to interfere with verdict of jury.*

A man must exercise care and discretion as to the time and mode of clearing his land; and if his neighbour be injured by rashness or inconsiderateness on his part, he will be liable to him for the damage.

It is, however, always a question for the consideration of the jury whether or not a man has exercised his own right to the injury of his neighbour; and where the case has gone fully to them, with all proper directions on the law by the presiding judge, their verdict will not be disturbed by the court, unless it is contrary to law, even though the evidence would fully have warranted a different finding.

[C. P., H. T., 1865.]

This was an action for setting fire to the plaintiff's woods. The trial took place at the last fall assizes, at Cobourg, before Morrison, J.

The facts of the case, as they appeared in evidence, were, that the defendant, desiring to make a small clearing on his land, which adjoined the plaintiff's, merely for the purpose of a "turnip patch," as it was called, during the very dry weather of the previous summer set fire to a portion of his premises, and the fire extended into and burned a large tract of the plaintiff's land.

There was conflicting evidence as to his having attempted to put out the fire, his efforts appearing to have been directed merely towards protecting his own property, and not the plaintiff's. The damage was very extensive, the fire having destroyed a cedar swamp, which the plaintiff had protected for between forty and fifty years, the timber from which, it appeared, would have sold well for railway ties.

The jury rendered a verdict in favor of the defendant.

*C. E English* obtained a rule *nisi* for a new trial, on the ground that the verdict was contrary to law, evidence, and the weight of evidence.

*Hector Cameron* shewed cause.

J. Wilson, J., delivered the judgment of the court.

The defendant had the right to clear his own land at any time, provided he did not injure his neighbour in doing it. In dry weather he was bound to exercise prudence and discretion in setting fire in his own clearing; and if he did so rashly and inconsiderately, in a place where, and at a time when, it was likely to injure his neighbour, and it did injure him, he was liable for the damage. These are rules deducible from considerations of natural right, and from time immemorial have been embodied in the legal maxim, "*Sic utere tuo, ut alienum non lædas.*"

But whether a man has exercised his own right to the injury of his neighbour or not, must be always a question for the consideration of the jury under all the circumstances of every particular case. Here all the circumstances were spread before them, and the learned judge gave all proper directions in point of law: no fault, indeed, has been found with the charge, but they found for the defendant.

The court is asked to grant a new trial, because the verdict is said to be contrary to law and evidence, and the weight of evidence. We think it was not contrary to law: certainly the evidence would have fully warranted a verdict for the plaintiff. The facts of the case were of a character familiar to the occupations of the jury, about which they were not likely to form an erroneous judgment. It was unfavorable to the plaintiff's view of it, and we cannot on authority disturb it. The rule will therefore be discharged.

Rule discharged.

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## Squire qui tam v. Wilson.

*Property qualification of Justices of the Peace—Con. Stats. C. ch 100, sec. 3—Conflicting evidence—Judge's charge.*

In a *qui tam* action against defendant for acting as a Justice of the Peace without sufficient property qualification, where the evidence offered by plaintiff as to the value of the land and premises, on which defendant qualified, was vague, speculative, and inconclusive, one of the witnesses in fact, having afterwards recalled his testimony as to the value of a portion of the premises and placed a higher estimate upon it; while the evidence tendered by the defendant was positive, and based upon tangible data:—

*Held* (*A. Wilson, J., dissentiente*), that the jury were rightly directed, "that they ought to be fully satisfied as to the value of the defendant's property before finding for the plaintiff; that they should not weigh the matter in scales too nicely balanced; and that any reasonable doubt should be in favour of the defendant."

Observations on the principle of the valuation of land with a view to determining the property qualification of Justices of the Peace.

[C. P. H. T., 1865.]

This was a *qui tam* action against the defendant for acting as a Justice of the Peace in and for the United Counties of Huron and Bruce without being qualified, according to "The Act respecting the qualification of Justices of the Peace," Con Stats. C cap. 100

The declaration contained eleven counts.

The defendant pleaded not guilty to all, and as to ten counts, an action *qui tam* pending against defendant at the suit of one David Paulin.

The plaintiff joined issue on the first plea, and replied to the second that the action of Paulin was commenced and prosecuted by fraud and collusion between Paulin and the defendant.

On this replication the defendant joined issue.

The cause was tried before Hagarty, J., at the last assizes held at Goderich, and a verdict found for the defendant.

In Michaelmas Term last, *Robert A. Harrison* obtained a rule *nisi* to set aside the verdict and for a new trial on the grounds of misdirection in this, that the learned judge told the jury that if there was any doubt as to the sufficiency of the defendant's property qualification as a Justice of the Peace, to give him the benefit of the doubt; and for non-direction in this, that the judge refused to tell the jury that by law the onus of proving a sufficient qualification was cast upon the defendant, and that if the jury doubted as to its sufficiency the verdict should be against the defendant; and upon grounds of improper rejection of evidence in this, that he refused to hear the testimony of Charles A. Harte, a witness called on the part of the plaintiff; and on grounds of surprise, and grounds disclosed in affidavits and papers filed.

During the present term, *C. Robinson*, Q C., shewed cause.—There is no reason for complaining of non-direction, for the presumption is always in favor of the good faith of a public officer. Before acting the defendant had to make oath that his property was worth $1,200. This he did, and he has proved by two witnesses that the property is of this value. It is true that the plaintiff produced as many and more witnesses to prove that in their opinion it was worth less, but they had not seen the property so fully as to be able to estimate its value, and after all it was but their opinion. It is true, too, that the statute requires the property qualification to be $1,200, but it is easy to get witnesses honestly to undervalue the property, and thus cast a doubt upon its value; but a doubt thus cast should be in favor of the defendant, because the presumption always is that a man is acting rightly, not wrongfully.

As to the rejection of the evidence of Harte, it must be admitted that his knowledge of the circumstances as to which he was called to speak was derived from the defendant during the relationship of attorney and client, and the evidence was, therefore, properly rejected. As to the affidavits filed by the plaintiff, they disclose no new facts, but a repetition of opinions of value, which are met by affidavits on the part of the defendant representing its value to be $1,200. There is no surprise, and no ground on which a new trial ought to be asked for or granted, for the defendant was the owner in fee of the land.

On the question of misdirection he referred to Con. Stats. Canada, ch. 100, secs. 3, 6; on the alleged non-direction to *Great Western Railway Company of Canada* v. *Braid*, 8 L. T. N. S. 31, S C. 9 Jur. N. S. 339; *Taylor* v. *Ashton*, 11 M. & W. 401, 417; Taylor on Ev. 4 ed. 366–369; *Connell* v. *Cheney*, 1 U. C. R. 307; and as to the surprise, *McLellan q. t.* v. *Brown*, 12 U. C. C. P. 542.

*Harrison*, in support of the rule, animadverted upon that part of the judge's charge, wherein he directed the jury not to weigh in scales too nicely balanced the value of the defendant's property. He argued that the statute required the qualification to be $1,200, and that the legal presumption was against the defendant if doubt

was thrown upon its value; for he was bound without reasonable doubt to have property of the clear value of $1,200, and the whole onus of proving this lay on the defendant. He cited *The Lexington F. L. & M Ins. Co.* v. *Paver*, 16 Ohio, 324; Best on Presumptions, 29, 57,

J. WILSON, J.—The 6th sec of the Con. Stats. C., cap 100, enacts that "the proof of his qualification shall be upon the person against whom the suit is brought." The defendant, in answer to the plaintiff's charge, that he had acted without the proper qualification, put in his oath of qualification, dated 17th of April, 1861, on certain property in Clinton, described therein. He called the person from whom he purchased the property in January, 1865, who proved that the defendant had then paid for it $1,200, and had since expended $400 more upon it, and that it was worth as much at the time of trial as it was when he purchased it. He proved by another witness, who had opportunities of examining it, that the lot on which the house stood was an eighth part of an acre, and was worth at least $1,200; that an adjoining lot of double the size, but with a house worth $400 less than the defendants, had been sold for $1,600 within three months.

To displace this evidence, the plaintiff called three witnesses to speak to the value of the property. The first was the assessor for the years 1859,'60 and '61. He said that he had assessed its yearly value in 1861 at $36, representing an absolute value of $600, which he said was a fair value. The lot is over forty feet front by two chains deep, and might be now worth $200 or $300, and the buildings might have cost $500 or $600, but are not worth what they cost: he was never inside the house, and had never examined it, with a few to value it, for three years. The next witness said he thought the property worth $700 to $800; he had been inside the house, but never up stairs; but he admitted he had never looked at it with a view to value, for he did not expect to be asked. The third and last witness said that before the repairs he thought it worth about $600, but he had not seen it since the repairs; he should not like to give $900 now; some might give more, and, perhaps, if he had examined it through, he might value it at more.

The learned Judge reports to us that he directed the jury, "that they ought to be fully satisfied as to the value of the defendant's property before finding a verdict for the plaintiff; that he thought they should not weigh the matter in scales too nicely balanced; and that any reasonable doubt should be in favor of the defendant."

The last part of this charge is what is complained of in the rule; but in the argument the mode in which the jury were directed to weigh the matter was insisted upon as objectionable.

In both respects we think the charge was right. This is the first time that any question has arisen as to the valuation of property in view of this "Act respecting the qualification of Justices of the Peace"; and it would be desirable if some principle of valuation could be laid down for the guidance of those who act, and those who may have reasons of complaint under it. It is for the most part a consolidation of the 6th Vic, cap. 8, which in the preamble recites that "as well by the criminal laws of England in force in this province as by divers provincial acts, Justices of the Peace are invested with great powers and authority, therefore it has become of the utmost consequence to all classes of Her Majesty's subjects that none but persons well qualified should be permitted to act as Justices of the Peace, and that the laws now in force in this province are insufficient for this purpose." It enacted, as the act before us does, that all Justices of the Peace shall be of the most efficient persons dwelling in the districts and counties respectively; and further, that no person shall be a Justice of the Peace, or act as such, who has not real estate, of the description mentioned in the act, of or beyond the value of $1,200 over and above what will discharge all incumbrances affecting the same, &c. The object of the act was two-fold; first, that the Justices should be of the most sufficient persons; and secondly, that they should be worth unencumbered real estate to the value of $1,200 at least, to satisfy any one who should be wronged by their proceedings. Then, that Justices might be deterred from acting, the right is given to any person to sue *qui tam* and recover a penalty of $100 for each offence against him who acts as a Justice without qualification, or without having taken and subscribed the oath of qualification set forth in the act. The present action is for ten such offences, and the point raised by this rule is, what is sufficient proof of this qualification, and in case the evidence of value be doubtful, which party is to have the benefit of the doubt. That the price paid for land and the money expended upon it, do not constitute its value, is a matter of every day's experience. We incline to think its value depends much upon the number of persons who at the moment are willing to purchase, coupled with the unwillingness of the owner to sell, and in a less degree by the amount of capital held for investment in land at the time. The anxiety of the owner to sell, when few are willing to buy, frequently reduces it to a value more nominal than real. Strictly speaking, the value of land, like any other commodity, is the price it will bring in the market at the time it is offered for sale; but to apply this rule to land in this country would be manifestly unjust, for there would be found times when no one would be willing to buy at any price, and for the simple reason that capital is not, and land always is, abundant in the market.

The defendant's oath of qualification was put in, and if evidence at all, it was evidence of value in his estimation; but in judging of the value a man sets upon his own property, especially if it be his home, we cannot weigh his opinion of it in "scales too nicely balanced." It may have acquired value in his estimation from its associations or, it may be, from the pains he has bestowed upon it to make it conformable to his ideas of elegance, or fitness, or comfort; or he may value it from the very preciousness which ownership and possession give to the house and home of most men.

Nor can we weigh the estimates of stangers as to the value of a man's house and land in scales more nicely balanced; for, allowing all credence to the honesty of those who give their opinions, they must be more or less speculative, accordin

the stand-point of view from which they are taken. The evidence for the plaintiff here affords an illustration. He calls the assessor for the years 1859, '60 and '61. In this last year the oath of qualification had been made. This witness, we have just seen, assessed its yearly value at $36, thus representing its actual value at $600. At present he says it may be worth $300 more, but he had never been inside the house at all; and yet the yearly value of a house, as well as its absolute value, must in a considerable degree depend upon its internal appearance and finish. Nor does he say how it is that it is worth more now than in 1861; but in this country property out of business situations will seldom rent to pay six per cent. of its value.

Another witness values it at $700 to $800; but he had never been up stairs and never had looked at it with a view to its value. Another says it was, he thinks, worth $600 before it was repaired but he has not seen it since; he should not, however, like to give over $900 now for it, although some might give more. If these estimates of value by the witnesses for the plaintiff were weighed in scales nicely balanced, there could be but indefinite justice. No proper valuation can be made of a house without seeing it inside; for some men disregard the exterior, who are lavish of internal finish, and *vice versa;* and what one or another would give as speculative amounts cannot be a safe rule of value, unless they have examined the property, or are intending purchasers. The defendant's witnesses represent the value of it to be $1,200 or more on given data, and on a reasonable knowledge of what the property was. If the plaintiff had met this by data more definite, by a comparison of the value of land in the immediate neighborhood, or by a detailed estimate of the value of the buildings and their state of repair, external and internal, there might have been ground for finding fault with the direction; but when the evidence is vague, where it might have been more definite, we think the learned judge laid down the only rule which was safe, at least under the circumstances of the case.

In the affidavits before us on this motion, for and against it, the same differences of opinion exist One witness for the plaintiff who had sworn, he would build now just such a house for $450, in an affidavit for the defendant corrects this and says, he could not do it for less than $600. We infer he had omitted to take into consideration the value of the verandah. On the one side they represent it as worth $1,200, on the other as of less value.

Then as to the express misdirection, "that any reasonable doubt as to value should be in favor of the defendant." When the defendant had made a *primâ facie* case, sustaining his oath, his conduct, and his obedience to an act of the legislature, by evidence based upon tangibe data, and when the plaintiff threw a doubt upon it, by evidence of speculative opinion, without given data, and without the knowledge of the thing valued, and without laying down any rule of general application, we can safely say that, under all the circumstances of this case, the learned judge was right in his direction. The plaintiff undertook to make out that the defendant had been guilty of dereliction of duty, if not of positive crime; but the presumption is always in favor of right acting, rather than of wrong doing.

The grounds for a new trial, on the score of surprise, we need hardly discuss: the plaintiff supposed the defendant's estate was a leasehold, which the latter answers by producing under oath his conveyance in fee. On the whole we think the plaintiff's rule should be discharged.

A. Wilson, J.—It is reported that the learned judge at the trial directed the jury that "they ought to be fully satisfied as to the value of the defendant's property before they found a verdict for the plaintiff; that they should not weigh the matter in scales too nicely balanced; and that any reasonable doubt should be in favor of the defendant."

The first part of the charge I understand to mean, that the jury should be fully satisfied that the value of the property *was not* what the defendant represented it to be, before they should find a verdict against him.

The statute provides, "that no person (except when otherwise provided for by law,) shall be a Justice of the Peace, or act as such, who has not in his actual possession, to and for his own proper use and benefit, a real estate, &c., of or about the value of $1,200 over and above what will satisfy and discharge all incumbrances;" and the act further provides, that in any action, suit, or information brought against a person for acting as a Justice of the Peace, not being so properly qualified, "the proof of his qualification shall be upon the person against whom the writ is brought."

The evidence in this case was contradictory. The evidence given by the plaintiff's witnesses was, that the property was worth $700 or $800, and that given by defendant's witnesses was, that it was worth $1,200.

I think the effect of the charge was, that the plaintiff had failed to sustain his case, because the jury might assume he had not successfully impeached the correctness of the defendant's valuation; instead of directing the jury that if the defendant had not satisfactorily made out that he did possess the necessary qualification they should find against him, because the law had cast upon him the burden of exonerating himself by proving affirmatively, as he was the proper person to do it and the one who could best do so, his own qualification.

As I think there was a misdirection, I think there should be a new trial, and this may be ordered for such a cause in a penal action. Whether it would be attended with a different result on any other charge which might be given, it is for the plaintiff to consider.

Richards, C. J., concurred with J. Wilson, J.

Rule discharged.

## COMMON LAW CHAMBERS.

(*Reported by* Robt. A. Harrison, Esq., *Barrister-at-law.*)

### Smith v. Roe.

*Attorney and agent—General agent and particular agent—Service of papers—Ratification of agency.*

The fact that a man employs another to do a specified act for him at a particular time, raises no presumption whatever that the person so employed has authority to do a similar act at a different time.

Where defendant's attorney, living in St. Thomas, sent an appearance to Messrs. B. B. & S., of London, whence the writ of summons issued, to enter there for him, which was done, and on the 24th January, plaintiff's attorney served the declaration and demand of plea on Messrs. B. B. & S., which did not reach defendant's attorney till the 25th January; *Held*: although on two other occasions B. B. & S. had entered appearances in like manner for defendant's attorney, B. B. & S. were not to be deemed general agents to accept service of papers for defendant's attorney; and, therefore, *held also*, that the time for pleading did not count till the 25th January, when declaration and demand of plea were actually received by defendant's attorney at St. Thomas, and so judgment entered on the 1st February following for default of plea set aside as irregular.

*Held also*, that the receipt of the declaration and demand of plea by defendant's attorney from B. B. & S., and subsequent sending of a plea to them to be filed and served, was not a ratification of the service on B. B. & S. as his agents, so as to make the service count from the day that B. B. & S. received it.

[Chambers, Feb. 28, 1865.]

This was a summons to set aside a judgment as having been entered too soon, and all proceedings subsequent thereto.

The action was brought in the Court of Queen's Bench, and commenced in the county of Middlesex.

Mr. Stanton, an attorney, residing at St. Thomas, in the adjoining county of Elgin, caused an appearance to be entered for defendant in the deputy clerk's office in London, sending the same to Messrs. Becher, Barker & Street, who entered the same for him.

Mr. Stanton had not any agent regularly entered as such for him at London, but had Toronto agents (Messrs. Crawford & Crombie) duly entered.

On the 24th January, 1865, plaintiff's attorney having ascertained that the appearance had been entered by or through Messrs. Becher, Barker & Street, served copy of declaration and notice to plead on them for Mr. Stanton.

On the 1st February, no plea being filed, plaintiff's attorney signed judgment; and on the same day one of the firm of Becher, Barker & Street served copy of pleas by Stanton on plaintiff's attorney, and on the same day filed it in the office. Plaintiff's attorney being the same day asked by them would he let defendant in to plead, declined doing so.

Mr. Stanton swore that he received the declaration on the 25th January, which had been served on Messrs. Becher, Barker & Street on the 24th; that the latter had no authority to accept service or receive papers on his behalf, and that on the 1st February he had sent the plea to them to file and serve: that he had been in the habit of sending appearances and papers to different attornies in London, to be filed or served for him, and received declarations and papers through different attornies, and has always regarded them as served on him at the time he received them, and not when handed to the practitioners in London to be sent to him; and that he regards the declaration in this cause as served on him the day he actually received it in St Thomas, viz., 25th January, and not on the previous day when served in London.

The plaintiff's attorney swore that he had searched in the deputy clerk's office for two years, and found only six suits in all the courts, in which Mr. Stanton had acted for parties; that Becher's name is entered in two of the suits as agent for Stanton; in two other suits no name appears as agent, but he (deponent) believed the appearances were entered by Becher: in another suit, brought by the plaintiff against one Charles Roe, the name of Mr. Abbott, another London attorney, appears as agent: no account was given of the sixth suit. It also appeared that on the 2nd February, the day after judgment was signed, the plaintiff's attornies, in another suit defended by Stanton, served declaration for him on Mr. Abbott, whose name appeared as agent for Stanton.

*R. A. Harrison*, contra.

The following cases were cited on the argument: *Clemow* v. *Officers of Ordnance*, 5 U. C. Q. B. 458; *Parke* v. *Anderson*, 5 U. C. Q. B. 2; *Houghton* v. *May*, 1 U.C. Prac. R. 165; *Hamilton* v. *Burns*, 1 U. C. Cham. R. 257; *Robson* v. *Arbuthnot*, 10 U. C. L. J. 186.

Hagarty, J.—The Common Law Procedure Act, section 61, is very explicit in providing for a case like this, viz.:—"If the attorney of either party do not reside or have not a duly authorized agent residing in the county wherein the action has been commenced, then service may be made upon the attorney wherever he resides, or upon his duly authorized agent at Toronto; or if such attorney have no duly authorized agent there, then service may be made by leaving a copy of the papers for him in the office where the action was commenced, marked on the outside as copies left for such attorney."

The plaintiff's course on this statute would have been very clear, and it is to be regretted that he did not follow it strictly.

I see nothing in the papers before me to warrant the assumption that Messrs. Becher, Barker & Street had any general authority to accept service of papers for Mr. Stanton, so that any service on them of Middlesex business would answer to a service on the regular Toronto agents.

The fact that a man employs another to do a specific act for him at a particular time, raises no presumption whatever that the person so employed has authority to do a similar act at a different time.

Lord Cranworth says, in a late case in the House of Lords (*Poole* v. *Leask*, 8 L. T. N. S. 645; same case, 9 Jur. N. S. 829): "Unless there is proof either that the agency is a general continuing agency to endure until revoked, or that the agent fills some character from which such a general agency may be presumed, the fact that there has been separate agency in any number of previous cases affords no evidence of agency on any subsequent transaction, however closely it may resemble all which have gone before."

Cockburn, C. J., adopts a somewhat similar view in *Moody* v. *London & S. C. Railway*, 1 B. & S. 290. Thus: "A man employs a solicitor, and even calls him his solicitor, but that does not give that person authority to bind him in a particular instance. Here nothing was proved except that on other occasions he acted as solicitor for the company," &c.

I also refer to a late case in our own court—*Myles* v. *Thompson*, 23 U. C. Q. B. 553.

All the evidence adduced to prove that Messrs. Becher, Barker & Street were Mr. Stanton's

Stanton's agents, consisted in shewing that in two previous suits they had entered appearance for him — the suits, I think, not proceeding beyond appearance, and that in this suit they had simply filed the appearance for him. I have seen no authority at all approaching the position contended for by the plaintiff. No conclusion of an authority to accept service can in my judgment be drawn from such acts.

But it is contended by Mr. Harrison that as Mr. Stanton in fact received the declaration and demand of plea from Becher, Barker & Street, and sent a plea to them to be filed and served, he thereby ratified the service of the declaration on them as his agents. This is almost the only point much in plaintiff's favor. But it seems to me as only amounting to an admission by Stanton that he had received the declaration and notice to plead from persons in London who were, as it were, asked by plaintiff's attorney to send or give them to him, and that in such a case his filing a plea was a voluntary act on his part, shewing his willingness to plead in the proper legal time after he had actually received or been served with declaration.

If Becher, Barker & Street were his agents, service of course was complete when the declaration was served on them on the 24th January, and it was equally so whether they ever forwarded it to Stanton or not. If not his duly authorized agents at the time of service on them, and if they did not receive the declaration and notice to plead as such agents, in what capacity did they receive them? I can hardly answer the question, except by saying that they were a mere channel of communication between plaintiff's attorney and Mr. Stanton—a mean adopted by the former to have service made on Stanton; and the latter, as it seems to me, had the right so to regard it, and to receive the declaration and demand of plea as he would from any ordinary third person instructed to give it to him, or as if he received it by post from plaintiff's attorney.

I agree that if he had authorized papers to be mailed to him from London, the service would be reckoned from the time of mailing, whether they ever reached him or not: (*Robson* v. *Arbuthnot*, 10 U. C. L. J. 186.) But there is only one alternative; he either authorized service on Becher, Barker & Street, or he did not. If he did not, then they received the declaration and demand of plea, not as his authorized agents, but merely as persons requested by plaintiff's attorney to send them to or serve them on him at his (the plaintiff's) risk; and Stanton's accepting it, and sending a plea to the same persons, to be filed within eight days from the time the declaration reached him, cannot, I think, be held to ratify the service on them to be reckoned from the time it was made.

The setting aside of this judgment may possibly work some hardship. This is to be regretted. But I think it necessary to have some intelligible rule to govern cases such as the present. The provisions of the statute, as I understand it, if observed, will prevent any difficulty in the service of papers.

I make the summons absolute without costs, unless defendant will undertake to bring no action for anything done on the judgment signed. If he so undertake, then with costs.

Defendant undertook to bring no action, and so summons was made absolute with costs.

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### Heron v. Elliott et al.

*Con. Stat. U.C. cap. 27, s. 9—Rules 93 and 132—Appearance by landlord, how entitled—Notice of appearance and notice of title, how entitled—Summons to set aside proceedings, how entitled—Unnecessary to serve notice of title.*

*Held* 1, that where leave is given to a landlord under the Ejectment Act to appear and defend the appearance must be entitled in the cause against the defendants named in the writ.

*Held* 2, that notice of appearance and notice of title if so entitled (*i. e.* in the cause against the original defendants) are correctly entitled.

*Held* 3, that a notice of title where a landlord is allowed to appear instead of the persons named in the writ need not be served.

*Held* 4, that a summons obtained to set aside the appearance and subsequent proceedings for irregularity styled in the cause against the new defendants was correctly entitled.

[Chambers, Feb. 28, 1865.]

Plaintiff obtained a summons calling upon defendants to shew cause why the appearance and notice of title filed by them and the notice of such appearance served, or some or one of them, should not be set aside as irregular with costs, on the grounds—

1. That the appearance was improperly styled as to the name of the cause.
2. That the notice of title was likewise improperly styled as to the name of the cause.
3. That no copy of said notice of title had been served on plaintiff's attorney.
4. That the notice of appearance was also improperly styled, and on grounds disclosed in affidavits and papers filed.

The action was ejectment and the persons named in the writ were John Springer, Elijah Corgell, Robert J. Cochrane, George Swift, and Robert McBride.

On 3rd February last Mr. Justice Morrison on reading the affidavit of the attorney for the defendants Andrew Elliott, Henry Cadwell, Mary M. Cadwell, Leonard Vaughan, Martha Vaughan, and Henry C. Shannon, by order made *ex parte*, entitled in the cause of the plaintiff against the persons named in the writ, gave leave to the persons first named to appear and defend the action for the property claimed, either jointly with any one or more of the persons named in the writ, or separately by themselves, and either as tenants of the whole of the lands claimed, or as landlords of part or tenants of the residue or otherwise howsoever.

On 7th February last the following memorandum of appearance was filed in the office of the deputy clerk of the Crown:—

*In the Queen's Bench.*

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|---|---|
| Charles Heron, plaintiff. And John Springer, Elijah Cargell, Robert J. Cochrane, Geo. Swift and Robert McBride, defendants. | Timothy Blair Pardee, attorney for Andrew Elliott, Henry Cadwell, Mary M. Cadwell, Leonard Vaughan, Martha Vaughan, and Henry C. Shannon, appears for them as landlords and defends for the whole of the premises herein, in the place of said defendants, |

under and by virtue of a judge's order bearing date the 3rd day of February instant

Entered this 7th day of February, A D. 1865.

T. B. Pardee,

Attorney for Elliott, Cadwells, Vaughans and Shannon.

On the same day Mr. Pardee caused a notice of appearance, styled in the same manner as the appearance, *i.e.* in the cause against the persons named in the writ to be served on the plaintiff's attorney, and on the same day filed a notice of title styled in like manner and addressed to the plaintiff's attorney, to be filed in the office of the deputy clerk of the Crown, but not served.

*Robt. A. Harrison* shewed cause. He adverted to the fact that Con. Stat. U. C. cap. 27, s. 9, declaring that any person not named in the writ, may, by leave of the court or judge, "appear and defend," on filing such an affidavit as therein mentioned, in no manner professes to regulate the form or style of the appearance. He next referred to Rule 93, Har. C. L. P. A. 635, which declares that "where a person not named in the writ of ejectment has obtained the leave of the court or a judge to appear and defend, he *shall* enter an appearance according to the C. L. P. A. entitled in the action against the party or parties named in the writ as defendant or defendants, &c." Thereupon he argued that the appearance in this cause was strictly regular and that to entitle them as contended for by plaintiff would be irregular. He pointed out that in *Haskins* v. *Cannon et al.*, 2 U. C. Pr. R. 334; *Peebles* v. *Lottridge et al.*, 19 U.C.Q.B. 628, no reference whatever was made by counsel or court to this rule of practice, and therefore that these cases should not be taken as establishing any different rule. He cited Chit., 9 Edn. 536, as supporting his contention. He also argued that the notice of appearance and notice of title were both correctly entitled, and that where persons not named in the writ of ejectment are allowed to appear and defend it is unnecessary to serve notice of title (Con. Stat. U. C. cap. 27, s. 8; Rule 93 *supra; Fairman* v. *White*, 24 U. C. Q. B. 123.) He contended that plaintiff's summons was incorrectly entitled, and that in any view the summons must be discharged, and as moved with costs, if discharged, must be discharged with costs (*Willer* v. *Hall*, 1 Dowl. N. S. 708; *Becket* v. *Durand*, 6 U. C. L. J. 15.)

*F. A. Read*, contra, argued that Rule 93 is inapplicable to the case of a landlord appearing in lieu of his tenant, that in such case the appearance must be in the cause styled against defendants actually appearing as the real defendants (*Haskins* v. *Cannon et al.*, 2 U. C P. R. 334; *Peebles* v. *Lottridge*, 19 U. C Q. B. 628; *Adshead* v. *Upton*, 22 U. C. Q. B. 429.) That the notice of appearance and notice of title were under any circumstances incorrectly entitled (*Thompson* v. *Welch*, 8 U. C. L. J. 183; *Harper* v. *Lowndes*, 15 U. C. Q. B. 480) and that the latter like a pleading should at least have been served (Rule 132, Har. C. L. P. A. 650; Con. Stat. U. C. cap. 22, s. 112, 122; *Watkins* v. *Fenton et al.*, 8 U. C. C. P. 289)

Adam Wilson, J.—The 93rd rule referred to by Mr. Harrison is as follows:—"When a person not named in the writ in ejectment has obtained leave of the court or judge to appear and defend he *shall* enter an appearance according to the C. L. P. Act, 1856, *entitled in the action against the party or parties named on the writ as defendant or defendants*, and shall forthwith give notice of such appearance to the plaintiff's attorney, or to the plaintiff if he sues in person."

The form in Chitty's Forms, 9 Edn. 536, is precisely to the same effect.

| | |
|---|---|
| A. B., plaintiff, against C. D. and E. F. defendants. | D. A., attorney for L. L., appears for him as landlord, &c., &c. |

And the notice of such appearance is entitled in the same manner, page 537.

The defendant's proceedings are therefore in my opinion sufficiently regular in form in the appearance, notice of appearance, and notice of title.

After the appearance and notice no doubt the person or persons admitted to defend must be named in the issue books, nisi prius record, &c., and therefore I hold that the plaintiff's summons entitled *not* in the name of the original defendants, but in the name of the landlords who have been substituted for the original defendants is regular, because that is now the proper cause pending and the proper style of it (*Peebles* v. *Lottridge*, 19 U. C. Q. B. 628.)

It does not appear by the statute that the appearance or a copy of it is to be served upon the plaintiff's attorney, and if so, the notice of the defendant's title, when there is one which is to be filed with the appearance, need not be served. The statute only requires that the notice limiting the defence to part of the property claimed should be served. I do not think the appearance in this action though substantially answering the place and purposes of a plea is a pleading within Rule 132, which requires pleadings to be served. It is provided by s. 16 of the Ejectment act that in case an appearance be entered the claimants or their attorney may without any pleadings make up an issue, &c. This summons must therefore be discharged with costs.

Summons discharged with costs.

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### The Queen v. Chamberlain et al.

*Bail in criminal cases—Copies of information, examination &c., how certified—Con. Stat. Can., cap. 102, s. 63.*

*Held*, that where a prisoner makes application to a judge in Chambers to be admitted to bail to answer a charge for an indictable offence, under Con Stat. Can., cap. 102, s. 63, the copies of information, examination, &c., may be received, though certified by the County Crown Attorney and not by the committing justice.

[Chambers, March 2, 1865.]

On 21st February last, defendant Chamberlain caused a notice to be served on the agent of the Attorney General to the effect that on the next day, at the hour of ten o'clock in the forenoon, an application would be made to the presiding judge in Chambers at Osgoode Hall for the admission to bail of the defendant Chamberlain to answer the charge for which he stood committed; and further, that certified copies of the depositions, &c., on which such application would be made had been brought from the office of the Clerk of the Crown into Chambers by judge's order for the purpose of the application.

The depositions, which were certified by the Clerk of the Peace in and for the county of Oxford, under the seal of the Court of Quarter Sessions in and for that county, disclosed the

charge of forgery, which was the charge for which the accused stood committed.

*Robt A Harrison* shewed cause, and submitted that the only jurisdiction which a judge in Chambers had to bail on such a charge was either on writ of *habeas corpus* or under Con. Stat. Can., cap 102, s 63, and that the latter statute requires a notice to the committing magistrate, and that the copy of information, examination, &c., should be certified close under the hand and seal of the convicting magistrate, which had not been done in this case, and so he argued that there was no jurisdiction to bail the accused.

*J B. Read*, contra, referred to the County Attorneys' Act, Con. Stat. U. C, cap. 106, which now provides that the County Attorney shall receive all informations, &c, which the magistrates and coroners are hereby required to transmit to him. He also referred to s. 9 of the Act, which provides that the county attorney shall be "the proper officer" of the court to receive depositions where a party is committed to trial.

Adam Wilson, J.—The committing magistrate must make a proper return of the informations to the County Attorney. After this has been done he cannot transmit such proceedings to the Clerk of the Crown, nor can he deliver the packet containing the same to the person applying therefor, because he has delivered the proceedings to the County Attorney, as he was bound, in whose custody they are and must afterwards remain.

I think in favour of liberty I shall make the order to bail upon the transmission and certificate of the County Attorney.

It would unquestionably be better to have this matter specially provided for by legislation, although it is not impossible now for the committing magistrate still to transmit a certified copy close under his hand and seal.

Order accordingly.*

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## Randall v. Bowman et al.

*Execution on judgment on specially endorsed writ before time limited in the C. L. P. A sec 55—An irregularity, when an abuse of the process of the court—Waiver—Assignment for benefit of creditors—Right of assignee to move to set aside execution.*

A writ of *fieri facias* issued on a judgment on a specially endorsed writ before the expiration of eight days from the last day for appearance, is an irregularity, and if knowingly issued, an abuse of the process of the court.

Defendants, who were in business, knowing that the writ had been irregularly issued said on the day after the issue of execution, that they would not mind the issue of the writ if they were only allowed to keep their store open for the remainder of the week, to which the sheriff assented and made arrangements for so doing: *held* not to be a waiver of the irregularity in the issue of the execution.

*Quære.* Can debtors, who, being unable to pay their debts in full before the issue of execution, called a meeting of their creditors with a view to an assignment under the Insolvency Act, waive an irregularity in the issue of execution, whereby one of their creditors gains an advantage over the general body of creditors?

Five days after the issue of execution, and four days after the conversation above mentioned, the debtors made an assignment for the general benefit of creditors under the Insolvency Act: *held* that the assignee in conjunction with the debtors, were the proper parties to move to set aside the execution

[Chambers, March 4, 1865.]

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* See page 142.

*J. A. Boyd* obtained a summons calling on the plaintiff to shew cause why the writ of execution against the said defendants' goods and chattels, issued upon the final judgment signed herein, on or about the 21st day of February, instant, and now in the hands of the Sheriff of Waterloo, should not be set aside with costs, on the grounds that the same was prematurely sued out upon said judgment before the expiration of eight days from the last day for appearance; and on the grounds that proceedings in insolvency had been commenced prior to the institution of this action and the issue of such writ.

And why the said sheriff should not be ordered to abandon possession of the said defendants' goods, and deliver up to the defendants or their assignees, the money made by him under said execution, with leave to file the said assignee's affidavit on the argument.

The affidavits filed on moving the summons shewed that on the 10th February last, defendants gave notice calling a meeting of their creditors with a view to an assignment of their effects under the Insolvency Act; that on 11th February, plaintiff in this cause issued and served upon defendants a writ specially endorsed for the amounts of severally promissory notes made by defendants, and held by plaintiffs; that on the 21st February, final judgment was entered in default of an appearance; that on the same day a writ was issued against the goods and chattels of defendants, and on the next day placed in the hands of the sheriff, who at once made a levy; and that on the 27th of February, defendants made an assignment of their effects to F. J. Jackson, under the Insolvency Act of 1864, at whose instance as well as on behalf of defendants, the application to set aside the writ was made.

On the return of the summons, an affidavit of the assignee was filed pursuant to the leave given in the summons, merely mentioning the date of the assignment, and stating that he had as well as defendants, authorised the application to set aside the writ.

*Robt. A. Harrison* shewed cause. He filed an affidavit of the plaintiff's attorney wherein it was sworn that execution was issued on the 21st February, by the special instructions of plaintiff, that word was sent to deponent by one of the defendants not to issue the execution for at least a couple of days after the plaintiff should recover judgment herein, to which the deponent made no reply, but issued execution on the day judgment was entered, and placed the same in the sheriff's hands; and before execution was issued in a certain other suit of a relative of the defendants, one Henry B Bowman, against Peter Jacob Heins, one of the defendants, which last mentioned judgment deponent believed was fraudulent and collusive; that on the morning of the day after the writ of execution was placed in the sheriff's hands, deponent met Israel D. Bowman, one of the defendants, who told deponent that execution was issued herein eight days sooner than the law allowed, if they defendants objected to it, to which deponent replied that the judgment recovered herein was all for money lent by plaintiff to them, and that if they could set aside the execution, deponent did not think

that they would attempt it under the circumstances, but that they could do as they pleased, to which defendant Israel D. Bowman said he would not have cared if it had not been given to the sheriff for a couple of days; that he then said he would not mind the irregularity of the execution if he could keep the store open as usual to the public for the remainder of the week, to which deponent said the sheriff would put their own clerk in possession if they wished that course taken, to which he replied that he did.

There was also filed on the part of plaintiff an affidavit of the sheriff, in which he swore that on the 21st of February, the writ of *fieri facias* was placed in his hands for execution; that on the same day defendants had knowlege that the writ was so placed in his hands for execution; that on the following day he called at the place of business of defendants for the purpose of seizing their stock-in-trade; that he had then no other execution in his hands against the defendants or either of them; but about 4 o'clock in the afternoon of the same day, a writ of execution against one of the defendants for nearly $490, in favor of Henry B. Bowman, who is the father of one of the defendants, and the father-in-law of the other defendant, was also placed in his hands; that when he called upon the defendants he saw both of them in their store in Berlin, and informed them of the nature of his business; that Israel D. Bowman, one of the defendants, told deponent the writ of *fieri facias* was irregular by being issued too soon, and could be set aside if they the defendants like to do so, that both of the defendants then stated to deponent that the objection they had to the writ herein being in deponent's hands was, that they wished to keep the store open as long as possible, to which deponent replied he could arrange that to their satisfaction; and subsequently saw them again on the same day, and both of them agreed to put their clerk, one Thompson in possession of the store as a sheriff's officer; that deponent accordingly put Thompson in possession under the writ issued herein, and defendants subsequently agreed to pay Thompson for his services in holding possession of the goods for deponent, and expressly consented to deponent's proceeding under the writ herein; that on 22nd February last, deponent advertized the stock-in-trade to be sold under said execution on the 3rd March last, and that he put up a notice of sale on the store of defendants in their presence, to which they made no objection; that from the general tenor of the conversation deponent had with the defendants, and on his agreeing with them to keep their store open with their clerk in possession and themselves in it as usual for the remainder of the week, deponent inferred that they defendants would take no steps to set aside said writ even if it were irregular.

Mr. Harrison contended that the assignee being a stranger to the judgment was not in a position to move to set aside the execution for irregularity; *Wilson* v. *Wilson*, 2 U. C. Pr., 374; *Perrin* v. *Bowes*, 5 U. C. L. J., 138; *Balfour* v. *Ellison*, 8 U. C. L. J., 330: that the writ though issued too soon was not irregular, that even if irregular when issued, the irregularity had been expressly waived by defendants on and after the 22nd February. *Rawes* v. *Knight*, 1 Bing 132; *Lloyd* v. *Hawkyard*, 1 Man. & Ry., 320: *Holt* v. *Ede*, 1 D. & L. 68; *Williams* v. *Rapelje et al.*, 11 U. C. Q. B. 420; *Jones* v *Ruttan*, 6 U. C. C. P. 402; *Ross et al.* v. *Cool*, 9 U. C. C. P. 94; *Ringland* v. *Lowndes*, 9 L. T. N S. 479;) and that the sheriff having acted upon their suggestion as a ground of waiver, the waiver was absolutely binding upon them; so that when the assignment was made, the execution was a binding writ in the sheriff's hands to be executed, and should prevail against the assignment (*Burn* v. *Carvalho*, 1 A & E. 883; *Woodland* v. *Fuller*, 11 A. & E 859.)

*J. A. Boyd*, contra, argued that the assignee was a proper person to move, and that the application might, if necessary, be made in his name alone. (27 & 28 Vic. cap. 17, s. 4, sub-sec. 9, s. 5, sub-sec 9;) that the execution having been issued in violation of the express language of the C. L. P. Act was clearly irregular (s. 55), and that being so the assignment must prevail against it (27 & 28 Vic. cap. 17, s. 2, sub-sec. 7, s. 3, sub-sec. 22.) that defendants were not in a position to waive any irregularities in the issue of the writ, to the prejudice of the general body of their creditors. (*Ib.* s. 8, sub-sec. 5, *Evans* v. *Jones*, 11 L. T. N. S 636), and therefore that the execution should be set aside with costs to be paid to the assignee.

Adam Wilson, J.—The plaintiff was guilty of an unauthorised abuse of the process of the court in issuing his execution against the goods of defendants on the very same day on which he became entitled to enter, and did enter his judgment for want of an appearance to his specially endorsed writ of summons where the Statute declares he "may at the expiration of eight days from the last day for appearance *and not before*, issue execution"

The effect of this, if allowed, would be to sweep off the whole estate of the debtor, and to prevent its just distribution among the creditors rateably according to the deed of assignment of 27th February, under the Insolvency Act.

There had been no waiver I think of the proceedings taken, and I doubt if there could be to the prejudice of the other creditors according to the case of *White* v. *Lord*, 18 U C. C. P. 289.

I have no doubt the application is properly made, and the execution will therefore be set aside with costs, to be paid to the assignee.

Summons absolute with costs.

## CHANCERY.

(*Reported by* Thos. Hodgins, Esq., LL.B. *Barrister at Law.*)

### Gore Bank v. Sutherland.

*Trust estate—Costs of Trustees' defence—Mortgagee's costs—Practice.*

A mortgagee filed his bill against the assignee of the mortgagor, whose title was that of an assignee for the benefit of creditors, under a trust deed excluding all preference and priority, praying that the trust estate might be first applied in payment of his specialty debt, and asking an account against the trustee with the view of charging the trustee with all payments made by him to simple contract creditors before satisfying the specialty debts. He then asked a sale of the mortgaged premises to make up any deficiency The trustee, instead of filing a memorandum disputing the debt, put in his answer contesting the rig

of the mortgagee to the relief prayed for against the trust estate, and submitting that the mortgagee was only entitled to the usual foreclosure or sale decree, but not to the costs other than a *præcipe* decree.

*Held*, That as the trust deed excluded all preference and priority as to the payment of the debts, that the rules applicable to the administration of the estates of intestates did not apply, and that the mortgagee, for anything beyond what his mortgage would realise, could claim only the same as other creditors,

And as the mortgagee could have obtained all the relief he was entitled to by a decree on præcipe, he was declared entitled only to the costs of such a decree. and was ordered to pay to the trustee his costs of defending the trust estate.

The bill in this case was filed by the Gore Bank as assignee of Robert Terrie against William Sutherland, the mortgagor, and Robert Linton, assignee for the benefit of the creditors of said Sutherland, and was in the usual form of a mortgagee's bill; but the plaintiff in the prayer of the bill prayed that the premises might be sold and the produce thereof applied in or towards payment of the mortgage debt and costs, and that the defendants might be ordered to pay the balance, if any, after such sale; and that it might be declared that the plaintiffs were entitled to rank upon all the residue of the estate of said defendant Sutherland so assigned for the amount of such deficiency, and to be paid the same, prior to all other creditors of the said Sutherland as of an inferior degree, or of such who were specialty creditors and subsequent in point of time to the plaintiffs' mortgage.

The defendant, Linton, answered the bill, setting forth that under the assignment all the creditors were entitled to share ratably, and without preference or priority, and that he had faithfully administered the trusts of said assignment, and had in accordance therewith paid the creditors of said Sutherland a fair and equal proportion or dividend of the estate; and that the plaintiffs had accepted a portion of said estate so distributed, and had given a receipt therefor as follows:—

"$458 79-100. Received from Robert Linton, assignee of the estate of Wm. Sutherland, the sum of four hundred and fifty-eight 79-100 dollars, being a first and final dividend of 28 67-100 per dollar on said estate. It is, however, agreed by me, that if any further claim or claims which are at present unknown to the assignee be presented, whereby it may be shown that we have received more than our just proportion of the proceeds of the estate, then we agree to refund such amount overpaid.

(Signed) "W. G. CASSELS,
"*Cashier*."

*Barrett*, for the plaintiff, contended that the plaintiff being a specialty creditor was entitled to exhaust the trust estate before relying on his mortgage, and that he was entitled to an account of money wrongfully paid by the trustee to simple contract creditors. He relied upon the rules applicable to the administration of the estates of intestates as being analogous to the plaintiffs' rights in this case.

*Hodgins* for the trustee, *contra*.

SPRAGGE, V. C.—The cases under administration orders do not apply. There the mortgagee who has a covenant for payment of the mortgage money is a specialty creditor for the whole mortgage debt; but here the mortgagee can only claim beyond his mortgage as a *cestui que trust* under the deed, and can only claim what the deed gives him. As to the costs, if he is entitled to any special relief, for which the registrar could not draw up a decree, he must have his whole costs and not be confined to costs of obtaining decree on *præcipe*. If he could have obtained upon *præcipe* all that he is entitled to, then he should be confined to such latter costs. Mr. Barrett says he ought not to pay the trustee the costs of his answer; but I doubt that. The trust estate was attacked, and a trustee should not be discouraged from putting in an answer to protect it.

I have seen the trust deed—all preference and priority is expressly excluded. The mortgagee, for anything beyond what his mortgage may bring, can claim only the same as other creditors. The plaintiffs, therefore, are only entitled to the costs of a decree on *præcipe*, and must pay the trustee his costs of defending the trust estate.

## CHANCERY CHAMBERS

(*Reported by* ALEX. GRANT, *Esq., Barrister-at-Law, Reporter to the Court.*)

### MACDONALD v. PUTMAN.

*Solicitor and Client.—Privileged communications.*

A defendant, one of the members of the firm of *G.* and *C.*, when proving a claim in the master's office, was called on to produce "all the letters to or from Mr. *L.*, (his solicitor.) in reference to the questions involved in the proceeding of proving the claim of *G.* and *C.*, excepting such as passed in contemplation of *G.* and *C.* proving their claim in the present suit" *Held*, that he was bound to do so.

The distinction between the protection afforded to solicitors and clients, respectively, with regard to communications made pending, or in anticipation of litigation, pointed out.

This was a motion by way of appeal from the certificate of the master, from which it appeared that he had refused an order on Messrs. Gilmour and Coulson, creditors of the defendant, Putman, to produce certain correspondence between them and the attorney who had been acting for them at law, in their action against Putman. The grounds of the appeal, and the authorities cited, appear in the judgment.

*Crooks*, Q. C., for the plaintiffs, who appeal.
*Hector*, Q. C., contra.

SPRAGGE, V. C.—A claim was made in the master's office by persons trading under the name of Gilmour and Coulson; and a member of the firm, Alfred Hiram Coulson, was examined by the plaintiff touching their claim. In the course of the examination the solicitor for the plaintiffs asked the witness "to produce all the letters to or from Mr. Lawder, in reference to the questions involved in the proceeding of proving the claim of Gilmour and Coulson, excepting such as passed in contemplation of Gilmour and Coulson, proving their claim in the present suit." "Under the advice of his solicitor the witness refuses to produce them, on the ground that they are privileged communications between Gilmour and Coulson and their solicitor." The master held that he was not bound to produce them. I have taken the question and the master's ruling from his certificate. The question is raised before me upon appeal from the certificate.

The short point is, whether the client, being the person interrogated, is or is not bound to disclose what passed between himself and his solicitor in relation to that which is now the subject of litigation, there being at the time of such communication no suit pending or in contemplation. A plain distinction runs through the cases where the discovery is sought from the solicitor, and where it is sought from the client; and if in this case it had been the solicitor that had been under examination, I should have had no difficulty in holding, not only that he was not bound to answer, but that he was bound not to answer.

The distinction to which I have adverted has been the subject of repeated comment by eminent judges, as unsound in principle. In *Greenough* v. *Gaskell*, 1 M. & K. 98, the disclosure was sought from a solicitor, of professional communication between himself and his client *ante litem motam*, and Lord Brougham, in his very able judgment, while holding such communication privileged from disclosure by the solicitor, took occasion to remark: "To force from the party himself the production of communications made by him to professional men, seems inconsistent with the possibility of an ignorant man safely resorting to professional advice, and can only be justified if the authority of decided cases warrants it."

In the case of *Lord Walsingham* v. *Goodricke*, 3 Hare, 122, decided nine years afterwards, Sir James Wigram, expressed himself strongly in favour, as a matter of principle, of the rule being the same where the client is interrogated as it is where the solicitor is interrogated. He said, "If the matter were *res integra*, I should scarcely hesitate to decide in favor of the privilege;" but he felt himself bound by authority, particularly in the case of *Radcliffe* v. *Furman*, 2 B. P. C. 514, in the House of Lords, to decide that communications between solicitor and client *ante litem motam* were not privileged from disclosure by the client, except only in so far as they contained legal advice or opinions.

In *Flight* v. *Robinson* 8 Bea. 22, heard the following year, Lord Langdale held the client bound to disclose communications between himself and his solicitor *ante litem motam;* and he held that compelling such disclosure was right in principle.

The same was decided by Lord Cranworth, then Vice-Chancellor, in *Hawkins* v *Gathercole*, 1 Sim. N. S. 150, upon the authority of *Lord Walsingham* v *Goodricke*, and without expression of the learned judge's views whether it was right in principle or not.

*Glyn* v. *Caulfield*, 3 McN. & G. at p. 474, quoted by the plaintiff, is not upon the particular point in question here. It is probably referred to for the language of the Lord Chancellor, (Lord Cottenham, I take it, from the date of the argument.) "that professional privilege is a ground of exemption from production adopted simply from necessity, and ought to extend no further than absolutely necessary to enable the client to obtain professional advice with safety; beyond what is absolutely necessary for this purpose, it ought not to be allowed to curtail that most important and valuable power of a court of equity, the power of compelling a discovery."

Before the last two cases, which were decided in 1851, occurred the case of *Pearse* v. *Pearse*, 1 1 DeG & S. 12, before Sir J. L Knight Bruce, then Vice-Chancellor, decided in 1846. The question arose upon the settling of interrogatories in the Master's office between vendor and purchaser upon a question of title, and what his honor did was to direct, not that any of the interrogatories should not be answered at all, but that some of them should not be answered *then*. (p. 29) The communications sought to be protected occurred *ante litem motam;* and the learned judge reviewed at length and with much force, the principle upon which disclosures by a solicitor are protected, while the like communications were not protected when the client was interrogated, and he argued, with great ability, against the soundness of any such distinction; and contended that *Radcliffe* v *Furman*, being a case where discovery was sought from a trustee, was not a binding decision where discovery was sought of communications in regard to a man's own individual affairs. The report of *Richards* v. *Jackson*, 18 Ves. 472, before Lord Eldon, he considered a very unsatisfactory one. The inclination of the learned judge's opinion was undoubtedly strong against the distinction as a matter of principle; and he questioned the applicability of the authority upon which Sir James Wigram had mainly decided *Lord Walsingham* v. *Goodricke*, against his own view of what was sound in principle.

Sir W. Page Wood, in *Manser* v. *Dix*, 1 K. & J. 451, heard before him in 1855, expressed his full concurrence in the view of Sir J. L Knight Bruce, in *Pearse* v *Pearse*. The question there also rose upon an inquiry as to title, and Sir Page Wood distinguished it from *Lord Walsingham* v. *Goodricke*. "Upon that ground," he says, at page 460, "I think that the distinction is that the whole question in that case was not a question upon the title, but whether there had been a contract or not." But while the learned judge took this distinction between *Lord Walsingham* v. *Goodricke* and the case before him, he intimated very clearly that in his view all communications between solicitor and client ought to be protected, whether the disclosure of them were sought from the client or the solicitor.

But in a case heard before the same learned judge in 1858, *Lafone* v. *The Falkland Islands Company*, 27 L J. Chy. 25, his language in delivering judgment would seem to indicate a modification of his views upon this point. One of the grounds taken by Mr. *Rolt*, in favor of the disclosure sought, was, that the communications were made *ante litem motam*. His honor did not at all intimate his opinion to be that that circumstance made no difference; his language was, "But they have been sworn to be in apprehension of litigation, and it appears to me that I should be refining too much if, when there was a contemplated litigation of some sort, the precise character and form of that litigation not being ascertained, I were to hold that information obtained in contemplation of that litigation was not to be protected, because the frame of the suit was somewhat different from what was contemplated. In effect, it was a matter in which

the company expected to be placed in litigation with an opponent, expecting that, they employed a solicitor, who says he wants certain information for their defence with regard to any litigation that can take place." This seems to assume that communications *ante litem motam* are not protected where the client is examined, and I think removes Sir Page Wood from the advocates of a contrary doctrine.

The present Master of the Rolls, in *Ford* v. *DePontes*, 5 Jur. N. S. 993, laid down the rule very generally in favor of protection to the client when interrogated; but in *Thomas* v. *Rawlings*, 6 Jur. N. S. 667, which appears to have been heard subsequently, though reported earlier, he states the rule thus, speaking of discovery by a solicitor, "He is not bound to disclose communications made by the client to himself, provided those communications have some reference to the *lis mota*, either before and in anticipation of, or subsequent to the institution of proceedings." It may be doubted whether Sir John Romilly is correctly reported, for the qualification introduced has no place when the disclosure is sought from a solicitor.

In *Lawrence* v. *Campbell*, 28 L. J. Chy. 780, Sir Richard Kindersley is reported as saying, "Whatever fluctuations of opinion have taken place on the question, it is not now necessary, in the case of an English solicitor, for the purpose of privilege and protection, that the communication should pass either during or relating to actual or expected litigation; it is sufficient if they are confidential between the attorney and his client in that capacity." The question before the Vice-Chancellor was whether the privilege extended to the case of a Scotch solicitor residing in England, consulted professionally by his client residing in Scotland. The disclosure was sought from the Scotch solicitor, and his honor, no doubt, stated the rule where the disclosure is sought from a solicitor. I think his words import this, and he would have hardly stated as settled law, that the rule as he stated it applied to disclosure by the client.

We find from the cases great difference of opinion among learned judges as to the soundness of the distinction contended for: Lord Brougham, Sir James Wigram, and Sir Knight Bruce, and, at one time certainly, Sir Page Wood, holding the distinction unsound in principle, and that all communications between solicitor and client, at whatever time made, should be protected from discovery, whether sought from the client or the solicitor. On the other hand, Lord Langdale and Lord Cottenham have expressed contrary opinions, and it is not improbable that the Lord Chancellor took occasion to say what he did in *Glyn* v. *Caulfield*, in consequence of what had fallen from Sir Knight Bruce, in *Pearse* v. *Pearse*.

But whatever may have been the opinions of learned judges, the cases decided upon the point preponderate in favor of compelling the disclosure where the communication has not been pending, or in anticipation of litigation, and the disclosure is sought from the client. *Pearse* v. *Pearse* can hardly, indeed, be called a decision the other way, as that case, as well as *Manser* v. *Dix*, did not proceed upon the general question, but upon the discovery sought between vendor and purchaser upon a question of title.

In this state of the authorities, therefore, I must hold that Mr. Coulson was bound to produce the documents demanded of him by the plaintiff's solicitor. I allow the exception to the Master's certificate.

## INSOLVENCY CASES.

**Before the County Judge of the County of Lincoln.**

### McInnes v. Brooks.

*Insolvent Act of 1864, sec. 3, sub. sec. 2—Demand on Trader to make Assignment—Default—Attachment—Endorsing Writ—Computation of Time—Affidavits.*

A trader having ceased to meet his liabilities, a demand was served upon him on 31st January, requiring him to make an assignment. On February 6th (the 5th being on a Sunday) an order was granted for and an attachment issued. One of the affidavits filed on application for attachment was sworn to on February 4th. On an application to set aside the writ and all proceedings for irregularity, it was *Held*,

1. That the order for the issuing of the writ was not made too soon.
2. That it was immaterial that one of the affidavits was made within the five days allowed for petitioning under sub. sec. 3, or for making an assignment in accordance with the demand;
3. That the writ of attachment should have been endorsed with a statemant that the same was issued by order of the judge of the county court; but an amendment was allowed on payment of costs by plaintiffs.
4. Objections that the affidavits of the two credible witnesses were not filed at the time of issuing attachment, that the proceedings were not taken three months, &c., and that sufficient time was not allowed to defendant to give notices required by act for taking proceedings on a voluntary assignment, were over-ruled.

The defendant being a trader, and having ceased to meet his liabilities generally, as they became due, a notice under sub-section 2 of sec. 3 of Insolvent Act was served on him on 31st January, 1865. On 6th February, 1865, (the 5th being a Sunday), an application was made and an order granted for an attachment, which was issued on that day. The order was granted on affidavit of the plaintiff, showing indebtedness, and that defendant was insolvent within the meaning of the above section, and negativeing notice of any proceedings by defendant to make a voluntary assignment; and on affidavits of two other persons, showing similar facts as to insolvency, and negativeing notice (one of these was sworn on 4th February) and an affidavit of no notice being published in newspapers in Hamilton or St. Catharines. A summons was taken out on the day the writ was returnable, to set aside the writ and all subsequent proceedings for irregularity, with costs, on the following grounds:

1. That the said writ of attachment was not properly endorsed, it not being shown that the same was issued under and by virtue of the order of the Judge of the County Court, of the County of Lincoln.

2. That one of the affidavits upon which the attachment was founded, and which was material, was made and sworn to before the time had expired when according to the Insolvent Act of 1864, the said defendant could file his petition praying that no further proceedings be taken upon the demand served upon him.

3. That the proper and legal affidavits of two credible witnesses, were not filed at the time of

issuing the said attachment showing that the said defendant was insolvent within the meaning of the said act.

4. That the said attachment was issued within the time allowed by the Insolvent Act of 1864 for the defendant to file his petition praying that no further proceedings be taken upon the demand which was served on the 31st day of January, 1865.

5. That the proceedings taken under the Insolvent Act of 1864, were not taken within three months next after the act or omission relied upon as subjecting the estate of the said defendant to the proceedings under the act.

6. That all the affidavits upon which the said attachment was issued, were made and sworn to within the time allowed by the said act to take proceedings after being served with the said demand.

7. That sufficient time was not allowed to the said defendant to give the notices required by the said act for taking proceedings under the second section of said act.

The plaintiff's affidavit showed, that his claim was on several over-due notes, only one of which had matured within three month before the insolvency proceedings, which was the only foundation for the fifth ground; and in support of the seventh ground it was shown that the notice could not have been published in the *Canada Gazette* or the *Niagara Mail* before the time when the attachment issued. The *Mail* being the only paper published at Niagara, but defendant's residence being nearer to Hamilton and also to St. Catharines than Niagara.

It was urged on behalf of the plaintiffs: 1. That it was not alone the ceasing to meet his commercial liabilities which constituted the defendant an insolvent, but the fact of his, while having so ceased, and having been required to make an assignment, failing to comply with the requirements of the act; and that whether or not a notice of a meeting for the purpose of making a voluntary assignment could have been advertised, the plaintiff had waited the time required by the act.

2. That as to the mode of the computation of time, as under sub-sec. 7 of sec. 3, the writ is to be subject, as nearly as can be, to the rules of procedure of the courts in ordinary suits as to its issue, &c.; it should be made in the same manner as in cases of notice to declare, plead, &c., and that under rule 166 of Trinity Term, 1856, the proceedings were not taken too soon.

The defendant's counsel relied on the decisions under cases under English statutes.

Lawder, Co. J.—As to the objection taken to the attachment, that it is not properly endorsed, it not being shown that the same was issued under, and by virtue of the order of the Judge of the County Court of the County of Lincoln, I think that this should have appeared on the face of the attachment, but inasmuch as the defendant shows by his petition and affidavit filed on the application to set aside the attachment, that an order was in fact made, although too soon, as claimed by defendant, (which I over rule), I think the writ can be amended, which I order accordingly; but as this application is perhaps not what can be called a vexatious one, and an endorsement is required to make proceedings regular, I grant and make order for amendment, on payment of costs by plaintiff to defendant; and I order that summons be discharged on amendment being made and costs paid.

## COUNTY COURTS.

In the County Court of the County of Essex.

*In re* Timothy O'Connell, an overholding Tenant.

*Overholding tenants—27 & 28 Vic. cap. 30—Procedure.*

*Held*, that a landlord proceeding under 27 & 28 Vic. cap. 30, against an alleged overholding tenant, must adduce some evidence to shew that the tenant refuses to give up the premises, and that his tenancy has expired.

*Held also*, that the affidavit of the landlord himself, filed under sec. 1, with a view to proceedings under the act, is not legal evidence against the tenant.

[Sandwich, Feb. 27, 1865.]

In this matter an order was made by the judge of the County Court, on reading the affidavit of George Murray, the landlord, under the 27 & 28 Vic. cap. 30, relating to overholding tenants, fixing a day and place to enquire and determine whether Timothy O'Connell was the tenant of Murray for a term which had expired.

*Horne* appeared for the tenant.

*Prince*, Q. C., for the landlord, proposed to read the affidavit of the landlord upon which the appointment was made, as evidence in his behalf, and contended that the affidavits made out a *primâ facie* case in his favor, and cast upon the tenant the onus of proving that the tenancy had not expired; and that, the tenant failing to adduce any evidence, the landlord was entitled to a precept to the sheriff, commanding him to place the landlord in possession of the premises in question.

Leggatt, Co. J.—The statute 27 & 28 Vic. cap. 30, is intended to provide a more expeditious mode of proceeding against tenants overholding wrongfully, than is provided by cap. 27 of the Consolidated Statutes of Upper Canada; and the language is precisely the same as the 63rd and following sections of the latter statute, with reference to the preliminary steps to be taken by the landlord.

Instead of making his application, however, to the superior courts at Toronto, and having a commission issued by those courts, and instead of summoning a jury to try the question of tenancy, the landlord now makes his application to the County judge, who forthwith appoints a time and place at which he will enquire and determine whether the person complained of was tenant, &c. There is nothing, however, in the whole act, that I can find, that would warrant the judge in ignoring altogether the rules of evidence which are observed in ordinary cases before a court, or which would justify the judge in issuing his precept to the sheriff to eject the tenant on the *ex parte* statement of the landlord. If the tenant do not appear, the landlord would of course be then entitled to an order *pro confesso*. The affidavit of the landlord is only inceptive, and intended simply to shew some grounds to the judge for proceeding under the statute. It constitutes, too, a sort of record,

shewing the issue to be tried on the day appointed for hearing, because the statute requires the landlord to state in his affidavit the reasons, if any, given by the tenant for not leaving the premises.

If we look at the affidavits in this case, it will appear that the landlord asserts one thing, and the tenant another, viz., on the one hand, that the tenancy had expired, and on the other, that it does not expire till the end of December next. This is the issue to be tried, and the affirmative is on the landlord.

The statute affords the landlord a very summary mode of proceeding against his tenant, and the judge of the County Court extraordinary powers. In the absence of anything in the statute expressly warranting a different course, I think it would be highly impolitic for a judge to grant an order for the expulsion of a tenant, except upon the most satisfactory and conclusive evidence, aside from the landlord's statement.

I think a judge acting under this statute cannot be too wary in this respect, as there can be no doubt that landlords would in many instances take proceedings under the act where they would hesitate to have recourse to the ordinary suit of ejectment, with the evidence which they might have at their command.

Having come to the conclusion that the landlord must adduce some evidence to shew that the tenant refuses to give up the premises he occupies, and that his tenancy has expired, if Mr. Murray is not prepared with such testimony, this application must be dismissed, but without costs, as it is a novel proceeding, under a new statute.

## ENGLISH REPORTS.

### COURT FOR THE CONSIDERATION OF CROWN CASES RESERVED, May 6.

(*Present, Lord Chief Justice* Erle *and Justices* Blackburn, Mellor, Smith, *and Baron* Channell.)

### The Queen v. Malany.

*Criminal law—County Courts—Perjury on examination on judgment summons.*

The prisoner was indicted for perjury, committed in the County Court of Birmingham. He was a defendant in a suit. After judgment had been given in the case against the prisoner, the judge was about to decide as to whether he should make an order for immediate payment of the debt, or whether it should be paid by instalments, and he asked the prisoner whether his names were not Bernard Edward Malany, in which names he had been sued. The prisoner swore that his name was Edward Malany only. The judge of the County Court upon this struck out the cause. The prisoner was tried before Mr. Baron Martin, who reserved a point, whether, under the circumstances, the prisoner was indictable for perjury.

*Gibbons* now appeared for the prosecution, and urged that under the County Court Act it was expressly stated that no misnomer should vitiate the suit if the person was commonly known by the name. The question was, whether it was matesial to the issue, and that depended upon the view taken by the judge. He submitted that the judge had made it material, and the jury had found that it was corruptly false.

The Lord Chief Justice said the alleged perjury was that the prisoner swore that his name was Edward, and not Bernard, and that in so saying he acted wilfully and corruptly. The objection was, that it was an immaterial inquiry. The court were of opinion that the objection could not be sustained. It was made material by the judge in the course of forming his judgment; he was going through the process, whether it should be judgment for instant payment or for payment by instalments, and in considering that he made inquiry as to the Christian names of the prisoner, and, in answer, the prisoner swore that which was false. He was of opinion that the conviction could be sustained. Conviction affirmed.

### The Queen v. Smith.

*Indictment for manslaughter—Ill treatment—Evidence—Dying statement.*

The prisoner was indicted for the manslaughter of Martha Turner. It was said that the deceased, a girl 22 years of age, was in the service of the prisoner, that she was of weak intellect, and that she died in consequence of insufficient food; that she was subject to great privations, was beaten and otherwise ill-treated, that threats were used to intimidate her, and she became ill and weak, and died. It became a question whether she was helpless and under the restraint of her mistress. The case was tried before Mr. Justice Smith. It was objected that there was no evidence to go to the jury. A dying statement of the deceased was admitted, which had been objected to. The learned Judge directed the jury that if they were satisfied there had been culpable neglect, and if the deceased was helpless and under the restraint of her mistress so that she could not withdraw from her control, then the jury might find the prisoner guilty. The jury convicted the prisoner. The following points were reserved for the opinion of this Court:—Whether the dying statement was admissible, and whether there was evidence to support the indictment.

*Bulwer* was now heard on behalf of the prisoner; and he urged that there was not sufficient evidence to show what had become of the girl from the time she had left the service till the time she was found at the workhouse, three days afterwards. She died from inflammation of the lungs, caused from a want of sufficient food. Witnesses were not called who could have given important evidence There was nothing to show any legal restraint by the mistress, and moral restraint would not make the prisoner responsible. What was called the dying statement of the girl was not admissible, as it was not properly obtained, and its contents were not evidence properly admissible.

The Court said they would wish to hear Mr. Metcalfe, who appeared on the other side, upon one point—namely, was the deceased under the dominion and restraint of the prisoner, so as to be unable to discharge herself from her control?

*Metcalfe* said the weak intellect of the deceased must be taken into consideration. The statement of the deceased was that she was ill, and was lying on the bricks in the cellar, and saw no other person but the prisoner, who came to her once a day to bring her some bread; there was a tap in the cellar from which she obtained water. Her mistress frequently beat her with a cane. The girl was under such moral restaint from the threats used by the prisoner that she could not get away.

Mr. Justice Blackburn said it was extraordinary that the woman who took the girl to the workhouse was not called. A prosecutor ought to endeavour to obtain the whole truth of the case, and not to keep back witnesses.

Mr. Metcalfe said he had reasons to doubt whether that woman would tell the truth.

The Chief Justice said, if the counsel for the prosecution believed that a witness would not state the whole truth, then it was his duty not to call that witness.

*Bulwer* replied.

The Court were of opinion that the conviction could not be sustained. The deceased was not in such a state that she could not have withdrawn herself from the control of her mistress. The ill-treatment spoken of was not sufficiently proximate to the death. From all that appeared the girl might have left at any time.—Conviction quashed.—*Times.*

## UNITED STATES REPORTS.

### Palmer v. Myers et al.

*Partnership—Assignment for benefit of creditors.*

When a partner has absconded, the remaining partners may make an assignment for the benefit of creditors, without his consent.

[Supreme Court—General Term.—February, 1865.]

This action was brought to set aside an assignment for the benefit of creditors, upon the ground that only two of the three partners, comprising the firm, actually executed the same, without the assent of the third. Other points were raised upon the trial, but were not presented to us on this argument.

The defendants relied on the defence, that the partner who did not sign the instrument had, before its execution, absconded from the city.

Upon the trial he offered to prove such absconding, and had executed an assignment in Massachusetts, without the consent of the other members of the firm, and that at the time of making the assignment by the defendants they were unable to procure the signature of said Johnson, the absconding partner.

The evidence offered was excluded, and the defendants excepted.

Judgment was rendered for the plaintiff.

By the Court: Ingraham, P. J.—That an assignment for the benefit of creditors made by a part of the members of the firm without the consent of the other member, where such partner is present, is invalid, has been settled by repeated adjudications: (*Pettee* v. *Orser*, 6 Bos. 128, affirmed in Ct. of Appeals, Dec., 1865; *Robinson* v. *Gregory*, Ct. Appeals, Dec., 1863; *Wells* v. *March et al.*, Ct. Appeals, March, 1864.) And it is also settled that the mere absence of the partner from the State when the assignment is executed will not make the transaction valid: (*Robinson* v. *Gregory, supra.*)

The reason assigned for these decisions is, that such a transaction breaks up the whole business of the firm, and places the property in the hands of the trustees, through the act of a portion of the members of the firm, when all should be consulted and have an opportunity of taking part therein, and in the selection of the trustee.

Even in a case where the transfer was for the purpose of paying a debt, although a majority of the Court sustained the transfer by one partner, it was seriously doubted by two of the Judges: (*Mabbett* v. *White*, 2 Kernan, 442.)

In the present case, one partner had absconded, and upon the trial the defendants' counsel offered to prove that, prior to making the assignment, Johnson, the partner who did not execute the assignment, "had ceased to act as a member of the firm, and he has absconded, and had made fraudulent conveyances of the copartnership property, &c., and that before and at the time of making the assignment the other partners used diligent efforts to obtain the concurrence of Johnson, but were unable to effect the same or have any communication with him." This evidence was excluded as immaterial on the objection of the plaintiff's counsel, to which the defendants excepted.

The question raised by this objection is, whether the fact, that one of the partners has absconded and ceased to act as a member of the firm, is a sufficient excuse for the execution of an assignment by the other partners, so as to sustain such an instrument as a valid transfer of the property of the firm.

The case of *Wells* v. *March*, in Court of Appeals, March Term, 1864, above referred to, is somewhat in point. In that case the assignment was executed by one partner only in his own name, and he signed the name of the firm. It appeared in evidence that the firm was Nace & Coe; that Nace had taken and used the property of the firm and absconded, leaving a letter addressed to Coe, in which, after admitting his conduct, he said: "Take charge of everything in our business—close it up speedily. I assign you my interest in the business of Nace & Coe." This letter and the absconding was held by the Court sufficient to authorize the execution of the assignment by the remaining partner, and the judgment in favor of the defendant was affirmed.

When one of a firm absconds, he abandons the business of the firm, and leaves the management of the affairs of the partnership with those who remain behind, and such act should, in my judgment, be construed as vesting in the other members of the firm full authority to manage and settle up the business.

It is, in fact, an abandonment to them of the entire management and disposition of the property belonging to the firm, and vests in them full authority to do what is necessary to pay the debts and wind up the concern.

The letter, in the case last referred to, was but an expression in writing of what was without it the natural consequence of the absconding partner's acts.

This was held in *Kemp* v. *Canby* (8 Duer, p. 1), and in *Deckard* v. *Case* (5 Watts, p. 22); *Kelly* v. *Baker* (2 Hilton, 531). Where one partner dies, the surviving partners have the control and disposition of the property, and may make an assignment of the property of the firm for the benefit of creditors, without consulting the representatives of the deceased partner (3 Paige, 517). The same rule should be applied to one who abandons the interests of the firm, and absconds, to avoid the creditors, or for any other cause, leaving to his partner the control of the business.

The evidence, I think, was admissible, and the Judge erred in excluding it. A new trial should be granted; costs to abide event.

Sutherland, J., concurred.—*N. Y. Transcript.*

## GENERAL CORRESPONDENCE.

To the Editors of the Law Journal.

*Insolvent Act of* 1864.

Gentlemen,—As a great difference of opinion seems to prevail in relation to the meaning of sub-section 16 of section 11 of the above act, I beg leave to submit the matter to the consideration of the profession throughout the province.

The sub-section is as follows: "The costs of the action to compel compulsory liquidation shall be paid by privilege as a first charge upon the assets of the insolvent; and the costs of the judgment of confirmation of the discharge of the insolvent, or of the discharge, if obtained direct from the court, and the costs of winding up the estate, being first submitted at a meeting of creditors and afterwards taxed by the judge, shall also be paid therefrom."

Some legal gentleman are of opinion, and one county judge has decided, that the whole sub-section applies to cases of compulsory liquidation *only;* while others contend that part of the sub-section clearly applies to cases of "voluntary assignments," where the insolvent has obtained a discharge from his creditors, and afterwards gets a judgment confirming that discharge from the judge of the county court, and also to cases where a discharge is obtained "direct from the court," without any preliminary proceedings having been taken.

It is a rather startling interpretation to give the sub-section, to hold that it applies to cases of "compulsory liquidation only;" because the act was framed for the relief of those already bankrupt, rather than to provide for cases of future bankruptcy. And if the costs of obtaining a discharge under a voluntary assignment are not to be paid out of the assets of the insolvent in the hands of the assignee, how is it possible for him to reap any benefit from the act? He has already surrendered, on oath, to the assignee "all his estate and effects, real and personal," and it is not reasonable to suppose that the legislature intended that he should find his own costs in some way or other, after he had given up every thing. The disbursements range from fifty to sixty dollars, and if these are not to be paid out of the estate of the insolvent, then the act is sadly defective. It is a stumbling block thrown in the way of the blind, and the sooner it is removed the better for those who expected some benefit from its provisions. It is a matter of the utmost importance to the community, and to the profession, and I trust that the county judges throughout the country will indicate, in some way, the interpretation which each is inclined to give it.

Solicitor.

Cobourg, May 27, 1865.

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To the Editors of the Local Courts' Gazette.

*Securities by public officials — Guarantee Societies.*

Gentlemen,—A great deal of information has been given on the subject of Division Courts in the *Gazette.* But there is one matter to which I desire to draw your attention—I mean the importance of having respectable men to fill the offices of Clerk and Bailiff—with this object I suggest that an act be passed authorising the judges to accept the bonds of some guarantee society, instead of the security now taken, which is often nothing more than a form imposing much annoyance and trouble on judges. I think this course would be the means of introducing a better class of men to offices of trust, and add much to the efficiency of the Courts.

Yours, &c.,

A Subscriber.

Kinmont, April 25, 1865.

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[This is a subject which is of importance not only to Division Court officers, but to all public officials. It has already, however, been brought before the Government, and a Bill is

in course of preparation similar to that suggested by our correspondent. There is, we believe, a similar act in force in England.—Eds. L. C. G.]

To the Editors of the Law Journal.

*Taxation of costs—Fee to clerk for taxing bill on judgment in default.*

Gentlemen,—Is a clerk of the County Court entitled to three shillings and four pence for taxing a bill of costs in a judgment for default of appearance? It appears to me that no such fee can be charged in a bill of costs in a judgment for default of appearance, there being no possibility of an allocatur being called for in such a case. I understand an allocatur to mean a certified memorandum (for which three shillings and four pence is received) of the costs from the clerk of the Court, to be used in the event of being required at a new trial, or for any other purpose.

An early answer will oblige yours, &c.,

A Member of the Profession.

To the Editors of the Law Journal.

*Taxation—Fee to clerk for computation.*

Gentlemen,—Will you be kind enough to inform me, if a stamp of one dollar for computation is required on a judgment for default of appearance, when there is no computation by the clerk, the only interest claimed by the plaintiff having been inserted in the special endorsement on the writ of summons (by consent of the defendant), and no further interest required to be calculated by the clerk?

An answer in your next issue will oblige

A Member of the Profession.

[We insert the above, but have no space in this number for comments.—Eds. L. J.]

## MONTHLY REPERTORY.

### COMMON LAW.

C. P. Jan. 27.

Evans v. Wright and Another.

*Interpleader—When granted—Tenant right—Dispute as to who is tenant.*

E. hired a farm, and his son resided on and managed it, paying rent, and taking receipts in his own name. The defendants gave the son notice to quit, and a valuation of tenant-right was made by valuers appointed by the defendants and the son. The father gave the defendants notice not to pay the amount of the valuation to any one but himself; and the son having commenced an action, to recover the amount of the valuation, the defendants applied for an interpleader order.

*Held*, that this was a case for interpleader, and that if the father was dissatisfied with the valuation, he might apply to the court for relief. (13 W. R. 468.)

### CHANCERY.

L. J. Jan. 31; Feb. 14, 28.

Jopp v. Wood.

*Domicil, acquired and original—Infant—Scotch merchant resident in India—Service under foreign government.*

A Scotchman went out to India in 1805, and died there in 1830, having returned to Scotland only once, for a short visit, in 1819. During the whole of his residence in India he was employed in trade. There was no evidence of an intention to return to Scotland before 1814, but from that date there was abundant evidence of a desire and intention to return.

*Held*, that his Scotch domicil of origin was never lost.

Domicil can be changed only "*animo et facto*," and long and continuous residence in a foreign country, other than that which is attributable to employment in the service of the government of the country, though possibly decisive as to the *factum*, is merely equivocal as to the *animus* of the *propositus*.

The *animus* requisite to effect a change of domicil consists in an intention to abandon the domicil of origin.

The cases as to servants of the East India Company are exceptions to the general rule, and their principle will not be extended.

Per Turner, L. J.—No presumption of intention to change a domicil can be raised from residence during the infancy of the *propositus*. (13 W. R. 481.)

M. R. Feb. 8, 10, 13, 15.

Davies v. Otty.

*Death of witness before affidavit filed.*

Where a witness, who has sworn an affidavit, dies before it is filed, the court will receive the evidence, making allowance for the circumstance that there has been no opportunity of cross-examination. (13 W. R. 484.)

M. R. March 2.

Wentworth v. Lloyd.

*Taxation of costs — Commission to examine witnesses abroad.*

The costs incurred in a colony, under a commission to examine witnesses, must be taxed in England upon the scale which would be allowed in the colony, and the taxing master, in case of difficulty, ought to refer to the colony for information, but not to send the bill of costs there for taxation. (13 W. R. 486.)

V. C. K. Feb. 28.

London Monetary Advance, &c., Company v. Brown.

*Practice—Form of decree—Bill for a legal mortgage—Deposit of deeds.*

Where there is a mortgage by deposit of deeds, and the memorandum states an agreement to execute a legal mortgage, a decree on a bill to enforce the security will not direct a sale, but foreclosure; but if there is no memorandum, a sale will be directed. (13 W. R. 490.)

V. C. W. Jan. 30; Feb. 13; March 3.

Kirkwood v. Thompson.

*Mortgage—Redemption—Power of sale—Purchase by second mortgagee—Trustee for sale.*

A second mortgagee may, in the absence of fraud, purchase the mortgaged property, on the best terms he can, when it is offered for sale by a prior mortgagee, under a power of sale.

Such a purchase is not affected by the circumstance that the second mortgagee has taken his security in the form of a trust for sale, or by the circumstance that the second mortgagee was in possession at the time of the sale. (13 W.R. 495.)

M. R. March 23, 27.

Mortimer v. Bell.

*Vendor and purchaser—Sale by auction—Puffing.*

A sale by auction is not rendered void in equity by the fact that a puffer was employed—not to screw up the price but only to prevent a sale at an under value.

It makes no difference that the defendant was the only *bonâ fide* bidder, and that all the ten biddings previous to his were fictitious.

*Semble*, unless a sale is expressed to be without reserve, it is implied that there will be a reserved price or bidding. (13 W. R. 569.)

## PROBATE.

In re English.

The intention of a testator that a duly executed paper writing should operate as a will, may be proved by parol evidence. (13 W. R. 503.)

Crofts v. Crofts.

Both the attesting witnesses to a will having given evidence against its due execution, the court held the presumption *omnia rite esse acta*, to be rebutted, although the will appeared on the face of it to be duly executed, and the attestation clause was complete and formal. (13 W.R. 526.)

## INSOLVENTS.

(*Gazetted March* 11, 1865.)

| | |
|---|---|
| John Stickland | Brantford. |
| David Linklater | Mitchell. |
| Daniel Harmer | Montreal. |
| Samuel Morningstar | Bertie. |
| George S. Morningstar | Bertie. |
| Levi Morningstar | Bertie. |
| James Doyle | Gananoque. |
| Benjamin Allen | Owen Sound. |
| Alfred Fisher | Sarnia. |
| Charles Page Cameron | Tp. Haldimand. |
| William Wilson | Port Hope. |
| William Mickle | Meaford. |
| Harrison C. Bettes | Brighton. |
| John Allen | Tp. Brock. |
| H. N. Case | Hamilton. |
| James Matchet | Tp. Nottawasaga. |
| Richard Dickson | Pembroke. |
| William Bennett | Port Hope. |
| Frederick Rumball | Clinton. |
| Henry C. Kaye | Guelph. |
| J. J. Marshall | Mount Forest. |
| U. C. Lee | Stratford. |
| James Charlton | Montreal. |
| John Sharpe | Asphodel. |
| Henry Fowlds | Asphodel. |
| Norbert Goderre | Montreal. |
| William Gordon | Millbrook. |
| Templeton Brown | Peterboro'. |
| Chas. Desjardins | Quebec. |
| A. Couture | Quebec. |
| Andrew Wallace | Goderich. |
| Robert Park | Goderich. |

(*Gazetted, 18th March*, 1865.)

| | |
|---|---|
| John Sullivan | Seymour. |
| Francis W. Heather | Peterborough. |
| Hector McLean | Tp. Mariposa. |
| Hugh McLean | Tp. Mariposa. |
| Archibald McLean | Tp. Mariposa |
| Thomas Gerrin jun | Mt. Vernon. |
| T. R. Cousens | Merrickville |
| Magloire Morrissette | Quebec. |
| A. Young & Son | Sarnia. |
| John David Fee | Stratford. |
| Henry Bechtel, jun | Tp. Waterloo. |
| Robert Jones | Guelph. |
| George Trock Morehouse | St. John. |
| J. Bte D'Aoust | St. Polycarpe. |
| William Browne | Ottawa. |
| J. W. Stone | Burleigh. |
| Giles Stone | Burleigh. |
| William Darley Pollard | Meaford. |
| Robert Sanderson | Hamilton. |
| Joel Carpenter | London. |
| Lachlin McQuarrie | Brampton. |
| W. A. McPherson | Richmond, C.E. |
| James Hickey | Kingston. |
| Adolphus Bourne | Montreal. |
| Peter Joseph Gilhausen | Ottawa. |
| John Carmody | Ottawa. |
| Anthony Gafney | Tp Horton. |
| David W. Wartman | Selby. |
| George L. Robson | Tp. Beach. |
| William Brogan | Ayr. |

## APPOINTMENTS TO OFFICE.

NOTARIES PUBLIC.

HUGH McKAY, of Delta, Esquire, to be a Notary Public in Upper Canada. (Gazetted May 6, 1865.)

FREDERICK WILLIAM OLLARD, of Brockville, Esquire, to be a Notary Public in Upper Canada. (Gazetted May 13, 1865.)

THOMAS M. FAIRBAIRNE, of Peterborough, Esquire, Barrister-at-Law, to be a Notary Public in Upper Canada, (Gazetted May 27, 1865.)

JOHN CRAWFORD, of Vienna, Esquire, to be a Notary Public in Upper Canada. (Gazetted May 27, 1865.)

CORONERS.

ARTHUR MOBERLY, Esquire, M.D., Associate Coroner, County of Simcoe. (Gazetted May 27, 1865.)

STEPHEN F. SMITH, Esquire, M.D., Associate Coroner, County of Perth. (Gazetted May 27, 1865.)

WILLIAM HAWKINS VARDON, Esquire, M.D., Associate Coroner, County of Waterloo. (Gazetted May 27, 1865.)

## TO CORRESPONDENTS.

"Solicitor"—"A Subscriber"—"A Member of the Profession"—"A Member of the Profession"—under "General Correspondence."

## DIARY FOR JULY.

1. Sat .... Long Vacation com. Last day for Co. C. to equal-
2. SUN ... *3rd Sunday after Trinity.* [Roll of Loc Mun.
3. Mon ... County Ct. and Surrog. Ct. Term beg. Heir and [Devisee Sittings commence.
8. Sat .... County Court and Surrog. Ct Term ends.
9. SUN ... *4th Sunday after Trinity.*
14. Frid.... Last day for Judges of Co. Cts. to make return of
15. SUN ... *5th Sunday after Trinity.* [Appeals from Ass't.
18. Tues... Heir and Devisee sittings end.
23. SUN ... *6th Sunday after Trinity.*
25. Tues... *St. James.*
30. SUN... *7th Sunday after Trinity.*
31. Mon ... Last day for Co. Clk. to certify County Rate to [Municipalities in County

## NOTICE.

*Owing to the very large demand for the* Law Journal *and* Local Courts' Gazette, *subscribers not desiring to take* both *publications are particularly requested at once to return the back numbers of that one for which they do not wish to subscribe.*

THE

# Upper Canada Law Journal.

JULY, 1865.

## HORSE RACING.

In these days of horse-racing extraordinary, when a French horse has had the unparalleled audacity to walk into England and quietly win the Derby, and so "achieve a victory greater than Waterloo," it may not be amiss to give a brief sketch of the laws affecting horse racing, as they at present exist.

Under the Common Law wagers are said to be valid, but they are illegal if contrary to public policy or public morality, and so many kinds of games and wagers are illegal at the Common Law: (*Wood* v. *Elliott*, 3 T. R. 693; *Cousins* v. *Nantes*, 3 Taunt. 522; *Hussey* v. *Cuckett*, 3 Camp. 168; *Dalby* v. *Indian Moses*, 15 C. B. 365.) Several old statutes were passed in England for the purpose of preventing excessive and deceitful gaming, the principal of which are 16 Car. 2, cap. 7, and 9 Anne, cap. 14. The latter of these (sec. 2) makes illegal any bet on any game, including horse racing, amounting in the whole at any one time or sitting, to the sum or value of ten pounds, and the loser of such a bet, if he has paid over money under it, may recover the same back by action.

The preamble to 13 Geo. II., cap. 19, is worthy of notice; it recites that "Whereas the great number of horse races for small plates, prizes, or sums of money, have contributed very much to the encouragement of idleness, to the impoverishment of many of the meaner sorts of the subjects of this kingdom, and the breed of strong and useful horses hath been much prejudiced thereby," and "for remedy thereof" it enacts that no person shall enter, start or run any horse, &c., unless it be the *bonâ fide* property of the person so entering it, and that no person shall enter, &c., more than one horse, &c., for the same plate or prize. Section 2 of the same statute provides that no plate or sum of money shall be run for which is under the value of fifty pounds. And by section 5 horse races within the protection of the statute were limited to races taking place on Newmarket Heath and Black Hambleton.

The remedy supplied by this statute appears to have been effectual, and that more speedily than could have been anticipated, for we find section 11 of 18 Geo. II., cap. 34, reciting that "the thirteen royal plates of one hundred guineas each, annually run for, and the high prices given for horses of strength and size, are sufficient to encourage breeders to raise their cattle to the utmost size and strength possible," it therefore takes away entirely the restriction as to locality of the race—permitting it to be run in "any place," which words have been interpreted not to refer exclusively to regular courses or established places for racing: (*Evans* v. *Pratt*, 3 M. & G. 759.)

It will therefore be seen from these statutes, as explained by various decisions, that where the wager or bet exceeds ten pounds it is immaterial to consider whether the race is legal or not, for such excess renders the bet illegal; and so, if the race be for fifty pounds or upwards, but the bet exceeds ten pounds, it is illegal.

There are several cases in our own courts in which races were declared to be illegal, and where the money deposited with stakeholders was recovered back.

*Sheldon* v. *Law*, 3 O. S. 85, is the leading case, and is thus summed up by *Macaulay, J.*:

"1. If it was a wager on a horse race, and not a match, it was void, because there was no match for £50, and the race being consequently illegal, all bets thereon were void.

"2. If the bet in question constituted the match, then it was void, because the parties

did not own the horses, and it was in direct contravention of the 13th Geo. II.

"3. If not the match, but a wager upon a match, it would seem void, as exceeding £10, under 9 Anne, ch. 14, although at Common Law all wagers were legal."

This case was followed in *Anderson* v. *Galbraith*, 16 U. C. Q. B. 57, *Battersby* v. *Odell*, 23 U. C. Q. B. 482, and other cases to the same effect.

It may be mentioned that in England the provisions of the 13 Geo. II. cap. 19, so far as relates to the subject of horse-racing, have been repealed by the 3 & 4 Vic. cap. 5; while the provisions of the 18 Geo. II. cap. 34, so far as they relate exclusively to horse-racing, are apparently not affected by the consolidated act respecting games and wagers, 8 & 9 Vic. cap. 109.

Thus it has been held in England, since the repeal of the 13 Geo. II. cap. 19, that a horse-race for money given by third persons by way of prize, is not illegal (*Applegarth* v. *Calley*, 10 M. & W. 723), and that a steeple chase for £50 or upwards is a lawful race, under the 18 Geo. II. cap. 34 (*Evans* v. *Pratt*, 4 Scott, N. R. 378). But where to debt for money had and received, the defendant pleaded that a certain race was about to be run, and that an illegal game called a lottery was set up by the defendant for certain subscribers of £1 each, in the whole amounting to £155, to be paid to defendant under regulations which were in substance as follows: that the subscriber whose name should be drawn out of a box, next after the name of the horse which should be placed first in the race, should be entitled to receive from the defendant £100; and the plea then alleged that the subscriptions were paid by plaintiff and others to defendant, and that plaintiff, under the regulations, became entitled to £100, it was held that the plea disclosed a transaction within the meaning of the English lottery acts, 10 & 11 Wm. III. cap. 17, and 42 Geo. III. cap. 19 (*Allport* v. *Nutt*, 1 C. B. 974).

Where a steeple chase was run according to certain rules and conditions, one of which was, "All disputes to be settled by the stewards, whose decision shall be final, and all objections to be made before starting," and among the horses which ran was a horse of the plaintiff and a mare of the defendant, and the latter having been declared winner was protested against as disqualified on the ground that during the race her rider had crossed the rider of another horse, which point was referred to the stewards, who by three against one decided against defendant's mare, it was held that the decision was not rendered void by the fact that one of the stewards who gave judgment against defendant's mare was interested in the result by having betted against her (*Ellis* v. *Haffer*, 4 Jur. N. S. 1025; 3 H. & N. 766). So where two out of three of the stewards, not being together at the time, signed their decision in favor of a horse, from which the third steward dissented, the decision was held binding on all parties concerned (*Par* v. *Winteringham*, 5 Jur. N. S. 787; El. & El. 394). Although the judges of a horse r ce have power to decide finally who is entitled to the stakes as winner, such power does not accrue to them until the race has been actually run (*Carr* v. *Martinson*, 5 Jur. N. S. 788; El. & El. 456). The mere walking over the course does not therefore entitle the party present in default of the other to a decision in his favor (*Ib.*)

The proprietor of a race course is not responsible for the purse run for, unless upon clear proof of an express undertaking to that effect (*Gates* v. *Tinning*, 3 U. C. Q. B. 295). If the express undertaking be proved, he would clearly be liable (*Ib.* 5 U. C. Q. B. 540). The winner has no right to recover back his entrance money because the purse has not been paid over to him (*Ib.* 3 U. C. Q. B. 295).

It may be interesting to the owners of trotting horses to know that trotting matches, even though taking place on ice instead of the orthodox "turf," and in harness, are legal "horse races" within the statute, a horse race having been defined to be matching the speed of one horse against another. *Macaulay, C. J.*, "could not find," however startling such a sight would have appeared to an English jockey of the old school, "that a race between two horses driven in sleighs on the ice is not a horse race just as much as it would be if the two riders had ridden upon the horses, either in saddles or bareback over the same course:" (*Fulton* v. *James*, 5 U. C. C. P. 182.)

Law reports, generally so dry, at all events to the uninitiated, occasionally afford amusement as well as instruction; and the case of *Wilson* v. *Cutten*, 7 U. C. C. P. 476, was a

"smart thing," even in horse-racing, although the ingenuity of the perpetrator was very properly unsuccessful. A match was made by the owners of two horses, on the following terms, namely, that "Butcher" was to distance "Warrior" three times out of five, in mile heats. Two heats were run, in the first of which Butcher did distance Warrior, but in the second Warrior distanced Butcher. Upon this, his owner contended that he had won the race, as, according to the rules of racing, a distanced horse could not run again. It was held, however, that this rule did not apply in such a case, and that the race was not won; and that, as there had been in fact no race, the plaintiff was only entitled to recover the amount he had deposited with the stakeholder.

## OTHER GAMES.

The question whether or not cock-fights are illegal, appears to be still undecided (*Martin* v. *Hewson*, 10 Ex. 737; 1 Jur. N. S. 214; 24 L. J. Ex. 147). A foot-race has been held to be "a lawful game, sport or pastime," under the proviso to sec. 18 of 8 & 9 Vic. cap. 109 (*Batty* v. *Marriatt*, 5 C. B. 818). But where a number of persons assembled together on a public highway, to enjoy a diversion called a "stag hunt," which consisted in one of the number representing a stag, and the others chasing him, this was held to be gaming under the meaning of section 72 of the English statute 5 & 6 Wm. IV. cap. 50, against gaming (*Pappin* v. *Maynard*, 9 L. T. N. S. 327). Half-pence used for pitch-and-toss are held not to be instruments of gaming within the 5 Geo. IV. cap. 83, sec. 4 (*Watson* v. *Martin*, 11 L. T. N. S. 372). The game of dominos is not in itself illegal, and playing at dominos does not necessarily amount to gaming, within the meaning of the statute (*Reg.* v *Ashton*, 1 El. & B. 286).

## VACATION.

We are glad to see that some enterprising young gentleman has taken the trouble to procure the signatures of the bulk of the profession in Toronto to a compact to close their offices at the hour of three o'clock during the long vacation. "All work and no play makes Jack a dull boy" is an old saying, and perhaps the one acted upon by our young friends in this matter. It would be well, however, to remember that there is a converse of this proverb, which is much more generally true than the other. There never yet was a lawyer who made his mark in the world who was not an industrious and attentive student.

We notice in one of our exchanges that the profession in Ireland have gone a step further, for we find the Attorneys' and Solicitors' Society lately adopted a resolution approving of the principle of granting a half holiday on Saturdays to clerks in solicitors' offices. This might also, with advantage, be done in this country, *provided always*, that those concerned would make up the difference by steadier application during the week. Only those who work hard can enjoy a holiday.

## JUDGMENTS.

### *QUEEN'S BENCH.*

Present: Draper, C. J.; Morrison, J.

Monday, June 12, 1865.

*Ball* v. *Sprung.*—Appeal from the United Counties of Huron and Bruce allowed.

*Robinson* v. *Waddell.*—Appeal from the United Counties of Northumberland and Durham dismissed with costs.

*Hazlitt* v. *Hall*—Rule absolute to enter verdict for plaintiff, pursuant to leave reserved.

*Macfarlane* v. *Ryan.*—A plea of accord, without averment of acceptance in satisfaction, held bad. Judgment for plaintiff on demurrer. Leave to apply within a month to a judge in Chambers to amend.

*Hamilton* v. *Shanly.*—Special case. Judgment of nonsuit to be entered.

*Taylor* v. *Rose et al.*—Appeal dismissed with costs.

*Macdonald* v. *Macdonell et al.*—Rule absolute to enter nonsuit.

*Kerr* v. *Brenton.*—Rule absolute to enter nonsuit.

*Mills* v. *Brent.*—Rule absolute to enter nonsuit.

*Gossage* v. *Canada Land Association.*—Rule absolute for allowance of bond for appeal.

*Heath* v. *Pentland.*—Appeal from the United Counties of Northumberland and Durham. Rule absolute to strike out the appeal, on the ground that bond for appeal defective.

*McDermott* v. *Workman.*—Judgment for plaintiff on demurrer, with leave to apply to a judge to amend within one week.

*The Queen* v. *The Toronto Street Railway Company*—Rule discharged; conviction affirmed.

*Craig* v. *Corcoran.*—Rule absolute for new trial. Costs to abide the event.

*Burns* v. *McAdam.*—Rule absolute to set aside nonsuit and enter verdict for plaintiff.

*Gwynne* v. *Grand Trunk Railway Co.*—Rule discharged, without costs.

*Shibley* v. *Corbett.*—Rule discharged.

*Oliphant* v. *Lesslie.*—Rule absolute for new trial without costs.

*McIntosh* v. *Tyhurst.*—Rule discharged.

*Dougall* v. *Wilson.*—Rule absolute for new trial on payment of costs by defendant's attorney within one month; otherwise, rule to be discharged.

*Stewart* v. *Lome.*—Rule discharged.

*Pickard* v. *Wixon.*—Rule absolute to enter nonsuit.

*The Queen* v. *Smith.*—Rule discharged.

*Bank of Montreal* v. *Reynolds.*—Rule absolute to amend pleas and for new trial; costs to abide the event.

*In the matter of Coe and the Corporation of the Township of Pickering.*—Rule absolute to rescind by-law, with costs.

*The Queen* v. *McLeod.*—Rule *nisi.*

*Leach* v. *Leach.*—Postea to plaintiff.

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Saturday, June 17, 1865.

*Gamble* v. *Great Western Railway Co.*—Special case. Judgment for plaintiff; Morrison, J., dissenting.

*Park* v. *Park.*—Rule discharged.

*Herbert qui tam* v. *Dowswell.*—Rule absolute to enter verdict for plaintiff for $100, on first count.

*Vidal* v. *Bank of Upper Canada.*—Rule absolute for new trial, on payment of costs within a month.

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## *COMMON PLEAS.*

Present: Richards, C. J.; Adam Wilson, J.; John Wilson, J.

Monday, June 12, 1865.

*Hatch* v. *The Queen.*—Appeal struck out.

*Moore* v. *The Corporation of the Township of North Gwillimbury.*—*Held*, that municipal corporations, unlike corporations created for the purpose of lending money, are not restricted as to the amount of interest they may receive and take for the loan of money.—Appeal from County Court of York and Peel allowed, and rule absolute for new trial without costs.

*Grace* v. *Thomas.*—Appeal from the County Court of Huron and Bruce allowed without costs, and rule absolute for new trial in court below upon payment of costs. (See report of case in 1L. C. G. 12.)

*Fourdrinier* v. *Hartford Insurance Company.*—Rule discharged. Leave to appeal refused.

*Russell* v. *Fraser.*—*Held*, that a memorial to a deed executed by grantor, the memorial being thirty years old, was good evidence of the existence of the deed, so as, after evidence of search, to admit of secondary evidence of the deed.

*Fisher* v. *Berry.*—Rule *nisi* to issue.

*Moore* v. *Boyd.*—Rule *nisi* refused.

*Dickson* v. *Grimshawe.*—Rule *nisi* granted.

*Scott* v. *Millar.*—Rule *nisi* refused.

*The Queen* v. *Finkle.*—Rule *nisi* refused.

*Crooks* v. *Dickson.*—Rule *nisi* refused.

*Selby* v. *Robinson.*—Rule absolute to reduce verdict to $193; as to the rest, discharged without costs.

*Campion* v. *Willoughby.*—Rule absolute for a new trial: costs to abide the event.

*Bettes* v. *Farewell.*—Rule discharged.

*Young* v. *Fluke.*—Rule absolute for new trial without costs.

*McNiell* v. *Kleher.*—Appeal from Frontenac dismissed with costs.

*Robinson* v. *Shields.*—Rule absolute discharged, upon plaintiff consenting to reduce verdict by $28. R. A. Harrison, for plaintiff, accordingly consented, and so rule discharged with costs.

*Bagley qui tam* v. *Curtis.*—Judgment for plaintiff on demurrer.

*Bank of Upper Canada* v. *Ockerman.*—Judgment for defendant on demurrer to plea.

*Miller* v. *Thompson.*—Rule absolute for a new trial without costs.

*Hogg* v. *Rogers.*—Appeal from the decision of the County Judge of the county of Grey. *Held*, that school trustees may, as often as necessary, make assessments for school purposes. Appeal allowed without costs, and judgment to be entered for defendant in court below.

*Kerr* v. *Kerwan.*—Rule discharged.

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Saturday, June 17, 1865.

*Davis* v. *The N. B. Marine Insurance Co.*—Judgment for defendants on demurrer, in accordance with decision in Queen's Bench, with leave to appeal.

*Bank of Toronto* v. *McDougall.*—Rule discharged. Leave to appeal refused.

*Ingalls* v. *Reed.*—Rule absolute for new trial without costs.

*Bank of Montreal* v. *Scott.*—Leave to plaintiffs to withdraw demurrer on payment of costs, and leave to defendants to amend without costs.

*Moffatt* v. *Grand Trunk Railway Company.*—New trial on payment of costs by defendants, unless plaintiffs consent to reduce verdict to $100; but if defendants decline to take new trial, and plaintiff to reduce verdict, then rule to be discharged with costs.

*Farewell* v. *Grand Trunk Railway Company.*—Judgment for defendants on demurrer to second plea to first count, and for plaintiff on demurrer to second plea to second and third counts; defendants to be allowed to amend their second plea to second and third counts without costs.

*Vidal* v. *Bank of Upper Canada.*—Rule absolute for new trial on payment of costs within a month.

*King* v. *McDonald.*—Rule absolute to enter nonsuit.

## SELECTIONS.

### THE CAPITAL PUNISHMENT WITHIN GAOLS BILL.

The excitement which was caused by the prospect of the penal death inflicted in London in November last, and which broke out before the scaffold on the morning of the execution in rioting and robbery, has provoked an attempt at remedial legislation, while the commission on capital punishment is deliberating. To judge the scene of November by its outward appearance, it was on one side the rabble in fierce enjoyment of *paneum*, or rather *bacchum, et circenses*, and on the other the *luquearius* of the law, exhibiting his skill in entangling a malefactor. It required, therefore, only a moderate amount of humanity, and a still smaller share of philosophy and prudence, to rush to the conclusion that because hanging a man outside the prison walls was attended by a throng in brutal disorder, there ought instead to be an orderly official ceremony inside the prison. It was natural for some member to take parliamentary time by the forelock, and within the first fortnight or so of the session to propose that the Legislature should declare the expediency of all capital punishment being carried into effect within gaols. Such is the preamble of Mr. Hibbert's bill, which awaits the question of its second reading to be put after the Easter recess. But, as Sir George Grey informed the House that publicity in giving effect to the extreme sentence of the law is one of the matters under consideration by the commissioners, we agree with the course advised by him, that before Parliament gives an opinion on this subject it had better be furnished with the fruit of the commissioners' inquiry.

Even under the recollection of all that recently took place at the Old Bailey, and with the sickening thought that it may be repeated again and again before this time next year with any degree of intensity, according to the circumstances of future murders, well worked by the press, patience in legislation is the more commendable, because publicity of punishment, as a principle, has hitherto received but little elucidation or discussion. Jurists have treated of punishment itself, in its reformatory and deterrent effects, as they result from a greater or less degree of severity in the exaction, or of cruelty in the nature, of the penalty. A large part of the argument on punishment has thus been directed to the question of softening or hardening the hearts of the criminal part of society, or of gaining or losing sympathy with the law. But the proposition whether, assuming that a particular punishment—such as flogging for violent theft from the person, or hanging for murder—is proper in kind, the lash or the gibbet should be used before the eyes of men, or the catastrophe should be removed from their presence, like the bloody decrees of fate from the Greek tragic stage, has not been examined by writers on jurisprudence. Various committees have sat on the criminal law from 1819, when it was requisite to consider whether capital felonies should continue to include those of above twenty barbarous statutes, such as 1 Philip and Mary, directed against Egyptians remaining within the kingdom one month, and others of George the Second's reign, against injury of Westminster-bridge, and sending threatening letters; and reports have been made on the ill results of excessive and indiscriminate vindication of the rights of person and property. But the existing commission is the first body which has been appointed to inquire into the principle which we have mentioned, as part of the system of capital punishment. Men have at present only the book of experience to which they can refer. But it is a book to be read cautiously on this occasion; for the very circumstance that certain punishments, which in former times used to be public, have now become private, might raise an argument that the tendency of civilisation is towards the principle of privacy; whereas we shall see that the consequenses which have resulted from the change furnish an argument at least as strong in favour of publicity.

Experience, if regard be had to broad facts in the history of punishment, would appear to sanction the withdrawal of executions from the public gaze. It is only necessary to mention some of the old modes, such as flogging a culprit drawn at the tail of a cart through the public streets, or setting him in the pillory to be insulted and pelted by those among the crowd who might be jealous above others of any offence against the majesty of the law. By the statute of the pillory of the 51 Hen. III. that engine was appointed for bakers, forestallers, and those who used false weights, perjury, and forgery. Lords of leets were to have a pillory, or otherwise it would be a cause of forfeiture: under the like penalty, too, they were to have a tumbrell for scolds and unquiet women. The corruption of the tumbrell's other name—the cucking stool, that is, scold's stool—into ducking stool, affords a further proof of the difference between later and former times, in the open display of punishment, for, according to Coke, 3 Inst., the scold, after her penance on the tumbrell, was "sowsed in the water." It is true that there is no privately inflicted punishment, at least in gaol, corresponding with the tumbrell or the ducking for a scold; but the treadmill and the crank, or other hard labour within the walls, may be fairly taken as modern substitutes for the pillory and the stocks. Flogging has been actually changed from a public into a private infliction. More germane to the matter of public hanging is the abolition—a generation or two ago—of the condemned man's procession from Newgate to Tyburn.* When his last journey on

* The last execution at Tyburn was in November, 1783.

earth was shortened to a few steps to the platform raised above the debtors' door, Monday, being market day at Smithfield, was regarded as the fittest for the sight. The market has gone elsewhere, but still Monday morning was the idlest of the six with the class of spectators at Newgate, and continued to be the day for carrying out the sentence of death, until it was lately altered, we believe, or intended to be altered to a quieter day—Tuesday. It is even proposed in the common council to pocure the removal of these scenes altogether from the present central populous spot. The duration, too, of the spectacle has been much shortened. There are now no last farewells between culprits and their friends recognised by them in the crowd, no dying speeches, either defiant or admonitory. The very struggles of the dying man are partly hidden by the machinery.

In view of these it is impossible to deny the tendency of the people of this country for centuries past in the direction of privacy in punishment for crime. But some of the facts involved in this experience also show indisputably that publicity would have been a shield against much inhumanity. In 1861, we were among the first to call public attention to some cases of flogging in prison, the exposure of which drew down the indignation of the community, and led to the passing of the Juvenile Offenders Act of the next session, c. 18. A boy of eight, we showed, received twenty-four lashes with the birch in prison. Two boys of nine were cut with fifteen lashes, not of the birch but of the cat. Children of ten had forty-eight lashes with the birch. A boy of eleven had twenty and fourteen lashes with the cat. A child of eight, eight lashes with the cat. It is sufficient to say that if such deeds had been attempted in the market place, the public would have forcibly prevented them. But the truth is that if flogging were publicly administered, such monstrous sentences never would have been passed at all. On this point some curious testimony was unwittingly furnished by Sir George Grey in the House on the 4th of this month. Respecting the flogging of boys by the police under the 10 & 11 Vict. c. 82; he said that in 1847 the question arose concerning the proper mode of carrying out the sentence of whipping boys, and it was deemed advisable that police constables should not administer a whipping unless under proper supervision. This was to prevent abuse. Sir Thomas Henry had assured him that the cries of the lads drew about the doors of the police offices a crowd, and that, in consequence, it was deemed advisable, in the metropolis, to refrain from sentencing boys to be flogged. Recently, Sir George added, the sense of the House had recoiled from a sentence of twelve lashes being inflicted on a boy of six years of age; and in another case, where a boy of ten years of age was being whipped, the surgeon who was present ordered the whipping to be stopped. "Unless due precautions are taken," said Sir George, "the law will break down." Such is private punishment, and such the influence of the publicity even of a boy's screams.

Public hanging is now carried out by the officers in the most merciful manner. If, through any mismanagement, there is the slighest increase of the criminal's sufferings, there are cries of anger and pity from the people. So great is the gentleness of demeanour and regard shown towards him in his last hours, that it is difficult to think of him otherwise than as an object of consideration, or to imagine that he could meet with other treatment were he put to death privately. But may not this very absence of distrust be the result of the check continually put by public observation on these official acts of the sheriff and his servants? We leave the question to the commissioners, not ourselves prejudging it.

Another question may be briefly asked. It is one of principle: Can any punishment, not being one of seclusion, be proper which is not fit for the public? Supplementary to this question, are the inquiries whether a man's last solemn moments and dying agony of spirit are a fit exhibition for a street multitude—fit, either as regards himself, or as regards the multitude itself. On the part of the multitude the attendance is voluntary; on his it is not. As to him, then, justice imperatively demands an answer to the inquiry. That point we also here leave to the commissioners, but with the reservation, that the alternative is not necessarily private hanging. The great question at the beginning of this paragraph must first be answered.

But as to the voluntary portion of the assembly, the vagabonds, the thieves, the prostitutes, the roysterers in the face of violent death, like debauchees in Athens death-stricken with plague; like a doomed ship's crew abandoned to rum and licentiousness—what will the commissioners say of them? Much has been heard of them through the press at every execution. They have been used as a strong argument for Mr. Hibbert's bill: paradoxical as it may seem, they are an argument against it. The din of outrage and blasphemy under the gallows proves the presence there of the class most under the sway of violent passions, and therefore most requiring the check which such an example can afford. They are not outrageous and blasphemous because it is a hanging that goes on. They would be equally so if it were the public funeral of a great Commander or of a noble citizen. What ever good is to be done by the exhibition of capital punishment outside the prison must be done to the lowest and worst of the people. Their display of their habitual recklessness and profanity proves nothing to the purpose. To expect them to leave their habits, and come to an execution demurely to repent, or, being there, to change their hearts, would be there to expect a miracle. Never-

theless, they are men, and they are the men to whom, if to any, the murderer's corpse, fallen suddenly by the arm of the law, where an instant before the living man stood, speaks as an unmistakeable warning..

Mr. Hibbert's bill takes all for granted. "It is expedient that all capital punishment should be carried on within gaols." The sheriff, the gaoler, chaplain (or other officiating minister), and surgeon of the gaol, and such other officers of the gaol as the sheriff may require, are to be present at the execution, and any justices of the peace who may desire to attend, and such other persons as the sheriff may think fit. So soon as the sentence has been duly carried into effect, the surgeon is to sign a certificate that the criminal was hanged by the neck until dead, and the sheriff, gaoler, and chaplain (or other person), are to sign, and any other person present may sign, a declaration that the sentence was duly carried out. The coroner is within twelve hours to hold an inquest and find whether the sentence was duly carried out on the prisoner condemned to death, but no officer of the gaol or prisoner is to be a juror. Printed copies of the certificate, declaration, and inquisition, are to be forthwith exhibited at the principal entrance to the gaol, and to be transmitted to the Home Secretary.

The bill is defective in providing only that the sheriff and others "shall be present at every such execution." It is usual, in order to make sure that the sentence has been duly performed, to allow the body to hang an hour, or some certain time. The official persons should be bound to remain in view of the body until it is taken down. The subsequent custody of the body until the inquest should also be provided for. The power given to the sheriff of allowing persons to attend may be intended in favour of reporters for the press; but it suggests a private exhibition of an odious character by tickets, or the like. As to the inquest, it is not easy to see how the coroner will obtain disinterested evidence. He can scarcely call on the friends of the deceased to indentify the body. The unofficial spectators would probably be unable to do so. The official persons could not be admitted witnesses at all, without nullifying the precautions intended by the bill. Apart from the indiscretion of any present legislation, neither in its frame nor in its provisions does the bill seem to have been sufficiently matured. —*Solicitors' Journal.*

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## USURY.

(*Continued from page 148.*)

II. Having endeavoured above to unfold and illustrate the practical bearing of usury in most of the states, we proceed now to review the incommodities of usury and the desirability or practicability of a reform in the law of New York.

1. We are told that the Mosaic law prohibited the Jews from taking interest: which, however, is proved to have been more a political than a moral precept, for it only prohibited them from taking usury of their own race, expressly allowing them to exact it of "strangers:" See Deut. xxiii. 20; Exod. xxii. 25; Prov. xxviii. 8; Lev. xxx. 36; Ezek. xxii. 12. Which is conclusive, for this stand point, that the taking of usury, or a reward for the use—for so the word signifies—is not *malum in se.*

Over-scrupulous writers have often drawn arguments from this source, and from the fanciful theories of Aristotle, Domat, and Pothier, that, as money is generally barren, to make it breed money is "preposterous."

Against the taking of usury, some theorists have held that it were a "pity the devil should have God's part, which is the tithe;" that the usurer is the greatest Sabbath-breaker, because his plough goeth every Sabbath; and that he is the drone Virgil speaketh of, *Ignavum fucos pecus a præsepibus arcent:* Virg. G. 4, 168; that usurers should have "orange-tawny bonnets," because they do Judaize.

The believers in this school have held (and certainly upon untenable ground), that, in case of cross notes, *i. e.*, where A. gives his note to B., and B. gives his note to A., but A.'s credit is much better than B.'s, and it is a part of the bargian that the notes from B. to A. shall be greater than the notes from A. to B., that such a transaction is usurious, when in fact it is merely a sale of a man's credit.

The canon law likewise prohibited the taking of any interest for money loaned, pronouncing it a "mortal sin." It is not surprising, under such strenuousness, that the taking of interest should have been looked upon with profound jealousy, and as writers have said, "horror and contempt,"—and that this delusion should have augmented. In that age, when money, as such, was comparatively a secondary consideration,—not a merchantable commodity as now,—it may be readily imagined how thoroughly the popular mind became imbued with this sentiment.

There appears to be no foundation in natural or revealed religion, inhibiting a man from realizing a profit on his money as well as articles of merchandise, goods, or lands; or if Doe were to let his horse to Roe to go a journey, it is no more than just that Doe should receive an equivalent for such benefit; and within the purview of the statute, a compensation in such cases, greater than the rate of seven per cent., is a *hiring:* Ord on Usury 28; 4 Wend. R. 679.

2. The plea of usury, like that of infancy, has been generally looked upon with disfavor by New York jurists, and a defendant setting it up will be held to strict rules, both in the mode of pleading and in the substance of the defence itself.

Savage, C. J., in the case of *Martin* v. *Foster*, Ord on Usury; 8 Wend. R. 533; 2

Kernan R. 223, observes: "Usury is a defence which must be strictly proved, and the courts will not presume a state of facts to sustain that defence, when the instrument is consistent with correct dealing." The law will presume nothing in favor of this defence, but rather against it: *Bailey* v. *Lane*, 21 How. Pr., 13 Abb. 354.

To establish a just medium, so that moneyed men will be induced to lend their wealth, and thereby quicken trade, has been considered by practical, far-sighted men as the safer and more politic rule, especially in governments whose organic law partakes either of the republican or democratic form.

In the Athenian Republic, Solon is said to have permitted parties to regulate the rate of interest by contract; but De Pauw observes, that usage finally fixed the rate at twelve per cent. in certain cases, and eighteen per cent. in others. Grotius believed that a "reasonable interest" ought to be allowed; as to what constitutes a reasonable rate of interest, must of necessity be determined and regulated by circumstances,—the peculiar state of society, commerce, and country, and the manner and kind of business transacted; for what would suit the demands of the people of China, would not meet with favor in England, neither will the rate of interest adapted to an inland state or city satisfy the people of a seaport city.

The late Henry Thomas Buckle (who was one of England's brightest intellects), in descanting upon Aristotle,—whom he considered little inferior to Plato in depth, and much his superior in comprehensiveness,—and of his purely speculative idea, that no one should give or receive interest for the use of money, remarks: "An idea, which, if it had been put into execution, would have produced the most mischievous results, *would have stopped the accumulation of wealth, and thereby have postponed for an indefinite period the civilization of the world.*"

Thus, upon Mr. Buckle's philosophy, the receiving a *reward for the use of money*, during the past few centuries, has not only not made the world more corrupt, but has produced a healthy zest in trade, yielding wealth and all the desirable elements of a true civilization.

Keeping in view the wants of commerce, the New York courts have invariably leaned toward the side of equity—frowning upon the plea of usury. And who can deny but that it is better for a people to have laws which will be administered with respect, and meet a ready acquiescence, than to have them evaded by the business community, and continually deprecated by the courts.

The New York statute (Vol. 3, tit. 3, secs. 1 and 2, 5 Cow. 144), rigorously provides that, no person or corporation shall, directly or indirectly, take or receive in money, goods, or things in action, or in any other way, any greater sum or greater value, for the loan or forbearance of any money, goods, or things in action, than seven dollars in the hundred for one year; and that the amount paid above that rate, may be recovered back if an action for the purpose be brought within *one year* after such payment or delivery. And that (as amended in 1837), "all bonds, bills, notes, assurances, conveyances; and all other contracts of securities whatsoever (except bottomry and respondentia bonds and contracts), and all deposits of goods, or other things whatsoever, whereupon or whereby there shall be reserved or taken, or secured, or agreed to be reserved or taken, any greater sum or greater value for the loan or forbearance of any money, goods, or other things in action than is above prescribed (*i. e.*, at the rate of seven per cent. *per annum*), shall be void."

Prior to May 15th, 1837, the laws against usury had much relaxed; but by an Act of that date the rigor of this statutory prohibition was restored in its fullest force—usury is thereby made a penal offence. In 1850 (Laws of New York Ch. 172), an Act was passed prohibiting corporations interposing the defence of usury in any case.

Fortunes are daily being made in Wall street, by money begetting money, despite this rigorous law; and no one rails on the man now-a-days who loans his money to best advantage, taking his chances of the breach of honor and law, nor is the matter even tauntingly cast up to such lender, as was the wont a few centuries ago, against which old Shylock is represented as having retorted.

The disadvantages of this usury law of New York are apparent to every candid, thinking mind. Millions of dollars lie idle year after year in consequence. If the law were to be repealed or modified, who can doubt that there would be more merchants and greater thrift, as more capital would be employed in a thousand avenues, where now is naught but inactivity. For nothing can more promote thriftness in every branch of trade than a perfect freedom to buy and sell.

The statute makes an exception in contracts of *bottomry* and *respondentia*, when in fact, in money loans the compensation received for the benefit, we submit, ought to be commensurate with the use and inconvenience or hazard incurred by the lender. There appears to be nothing in the nature of such contracts necessitating this sharp distinction. Some may hold, that prodigality would follow by greater facility in borrowing. It has never been so demonstrated by history; on the contrary, we submit (and against the position taken by Jeremy Bentham), that by restrictive laws in times of great emergency, or panic, money is largely enchanced, necessarily causing the greater pressure upon the distressed, compelling ruinous sacrifices of property, as in such times men will not lend at regular rates, and if more be stipulated for, would continually

tremble under usury's fearful arm. Men have thus been ruined, rather than run the risk of violating this law,—which perchance would lose for them both "itself and friend."

The prohibitory system thus aggravates the very evils which it is intended to mitigate, making often the poor poorer, as was realized in the panic of 1857, the rich more avaricious, the cautious more timid, the prodigal more prodigal, the rash more rash, and introducing many perturbations in society, which secretly impair or sap the foundations of truth and commerce.

Lord Bacon, in one of his moral essays, has discussed the question, examined the advantages and disadvantages of interest, and concludes that two things are to be reconciled: the one, that the tooth of usury be grinded, that it bite not too much; the other, that there be left open a means to invite monyed men to lend for the continuing and quickening of trade,—and recommends a general rate of interest, say seven per cent., as in New York, for ordinary cases, and a higher rate of interest, in matters of trade.

The statutes of some of the states have wisely provided, that a greater rate than simple interest may be recovered if specified in writing, which has proved to be (as in Michigan and Illinois for example) far more advantageous than a law like that of New York. And even in California, where they have *no penalty* for usury, but parties are left free to contract for money or goods, commerce thrives almost beyond comparison. A usury law may be proved to be necessary in New York, but if so, we hold that the present one works indubitable evils. Let lawful interest still be seven per cent., to be taken by moneyed corporations; but would it not be most politic at the present time, to allow individuals to make their own contracts relative to goods and money, limiting them, say, to *ten per cent.* interest. Such a law would, without doubt, work a great benefit, as we should then have a quickening spirit in trade, and commercial men and the courts would respect and strenuously uphold the law; as with Lord Bacon, we believe, "it is better to mitigate usury by declaration than to suffer it to rage by connivance."—*American Law Register.*

J. F. B.

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Our readers will be sorry to learn that one of most noted *habitués* of our courts of equity will be seen no longer. Miss Flight, well known to the readers of Dickens, better still to all equity barristers and solicitors, fell down dead in the Middle Temple this week. Though the account given of her by the eminent humourist above mentioned was more or less a pen-and-ink sketch from fancy, and some of the accounts which we have seen of her even in grave periodicals are absurdly exaggerated, still she was an appendage to the Court of Chancery too remarkable and long-standing to be permitted to pass away without a notice. It is not, so far as we know, true that she ever stopped a judge on the bench in course of delivering judgment, or exclaimed, "Oh, you vile man! oh, you wicked man! Give me my property! I will issue a *mandamus* and have your *habeas corpus!*" nor did we ever see a seat provided for her "beside the bar;" but it certainly is the case that she was constantly to be seen fingering dirty papers tied up with tape, essaying to commence, generally when the judge rose for luncheon, some unintelligible motion, or shaking her lean fist stealthily and in silence at him when she supposed that he was not looking that way. She had not, so far as we could perceive, any preference for or prejudice against any particular judge; in each court her proceedings were alike, and she distributed her attendance with no obvious partiality. What the mystery was between Miss Flight and the Bar no one can tell; she may have been the embodiment of a particular wrong, or the last representative of a superannuated servant; perhaps she was pensioned merely out of some stray idea of benevolence. However that may be, it is true that she received from the right learned Middle Temple a sum of — shillings per week, which she added to a sum of — shillings received from the right learned Inner Temple, and so she supported life. But why the learned of the law gave something for nothing, and were considerate of, and even respectful to, the little woman, let no man inquire. She has gone, and few of those who know aught of her history will grudge her a word of regret.—*Solicitors' Journal.*

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## SHOULD DISSENTING OPINIONS BE REPORTED.

The recently appointed reporter of the Supreme Court of the United States, in his preface, has expressed his intention to weed future reports of cases inferior in their interest, "so that decisions of value or decisions on points of value shall not, as they now too much are both in England and with us, be overlaid and buried by reports of matter sometimes often previously decided, and sometimes so perfectly plain as not to be worthy of either litigation or report at all." "In no other way," he says, "can the class of cases secure for any term of years a distinguishing reputation and authority." But another matter requires attention also. We refer to the number and length of dissenting opinions which are to be found in some of the past volumes of Supreme Court reports. Such opinions should not be tolerated in courts of last resort, except in the rarest cases; cases of constitutional or public law perhaps, and there, as everywhere, they are *most* undesirable. If the arguments on both sides are fully reported—as they ought to be in cases where there may be a proper difference of view—

there is no necessity for them. Every purpose of a dissenting opinion is answered by a mere entry of dissent. The ground of it is seen by intelligent readers in the argument of opposing counsel. And a dissenting opinion does nothing but invite disrespect to a judgment which ought to be received as only short of infallible. It does nothing but keep litigation on foot, when, by the judgment, litigation ought to be settled and to cease. When a judge has fully combatted his brethren in the conference it is, in our view, something like judicial treason for him—unless it is a case very exceptional—to show why the judgment of his fellows is worthy only of *dis*respect. The Legislature of Pennsylvania prohibits the publication *in the reports* of *any* dissenting opinions; leaving their authors to publish them if they like, as the late Judge Baldwin did his; at his own cost, and in a worthless volume by themselves.

In Massachusetts—the Supreme Court of which State has a higher reputation than that of any other State court, it is understood to be a *point of honor* among the judges, not —except in most rare cases—to make known their disagreement with the majority—that is to say, with THE COURT, even where in fact they do disagree; and in those few cases where they do disagree they seldom give a dissenting *opinion*. Hence, among other reasons, the esteem in which the decisions of that tribunal are held everywhere in the United States, and even in England itself, and the extent to which they are read and cited. Whatever heats disturb the conference—unity, agreement, infallibility—is the only aspect in which the reverend judges appear before their bar, their suitors, and the world. Obligatory on every court which challenges supreme respect, most obligatory is this *appearance*, at least, of unity in our Court of Courts, "our more than Amphictyonic council." Whatever family weakness may exist let the least possible, or none at all be *revealed*. If the error of the judgment is plainly erroneous, the world will be quite prompt to discover it. If the error is so deeply hidden that no one but the dissentient judge could discern it, it is not likely either that *he* will satisfy the world of its reality, or that by remaining satisfied the world itself will greatly suffer. And while he may himself think that he is making for the profession an argument that will outlast the stars, he may be making no argument at all, but recording only—an unfortunate fact about himself. Old things—some of them we may fairly hope have passed away. All things—all we mean that deviate from the better models—are becoming new.—*Legal Intelligencer.*

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# UPPER CANADA REPORTS.

## QUEEN'S BENCH.

(*Reported by* C. Robinson, Esq., Q.C., *Reporter to the Court.*)

### Paterson v. Todd.

*Sale of lands under execution—Ejectment on sheriff's deed—Defects in the advertisement—Effect of—Proof of judgment.*

Errors or defects in the advertisements, either in the *Gazette* or local paper, of a sale of land under execution, will not affect the purchaser's title, even if he be one of the execution creditors.

In ejectment upon a sheriff's deed for land sold on execution, it appeared that the sale had been duly advertised in a local paper for three months before the 27th of August, 1864; and that an advertisement incorrect in some particulars had been inserted in the *Gazette* of the 11th of June, 1864, and four next numbers; the errors being corrected in the sixth assertion—all these advertisements being of a sale on the 27th of August. On the 1st of October following, and in the five next numbers, the sale was advertised in the *Gazette* for the 12th of November, not as a postponement of the previous sale; but this was not published in a local paper, and though notice of it was put up on the door of the court-house, it was not shewn to have been continued there for three months. *Held*, that the advertisements could not be considered a compliance with the statute, C. S. U. C., ch. 22, sec. 267, but that the defects would not affect the purchaser's title.

Judgments may be proved at *Nisi Prius* by producing the original roll as well as by exemplification, but the clerk should not produce such roll without proper authority.

[Q. B. H. T. 1865.]

Ejectment for part of park lot number 8, being the north half lot numbered and laid down on the plan of the said park lot number 8 and park lot number 7, made by D. P. S. Robert Lynn as lot number 59 on the east of Victoria street, in the city of Toronto, described by metes and bounds. Defence for the whole.

The claimant gave notice of title under a deed of sale to himself from the sheriff of York and Peel, made by virtue of certain writs of execution against the lands of the defendant, and under a deed of confirmation made by the sheriff and endorsed thereon.

The defendant gave notice of title under a deed from James S. Murray.

The trial took place at the assizes for York and Peel, in January, 1865, before *Hagarty*, J.

The deputy sheriff was called as a witness, and produced executions against the lands of the defendant in three suits, and stated that the lands in question were sold on these writs, and that the plaintiff was the purchaser. He proved the execution of a deed dated 22nd November, 1864, reciting a writ of *fi. fa.* dated 2nd March, 1863, and renewed for one year from the first of March, 1864, at the suit of Henry Abraham Joseph against the lands of the defendant; reciting also a writ of *fi fa.* received by him on the 16th of March, 1863, at the suit of James Paterson and Robert A. Harison against the lands of defendant; and reciting also a third writ of *fi. fa.*, dated 16th of March, 1863, and renewed for one year from the 3rd of March, 1864, at the suit of William Wakefield and Frederick William Coate against the lands of the defendant—under which writs he seized, &c., and advertised, &c., and returned to the writ of Henry Abraham Joseph that he had seized, &c., but the lands remained on hand for want of buyers; and reciting a writ of *ven. ex.* to sell those lands; and that on the 12th of November, 1864, the sheriff

exposed for sale the land now in question under the writ of *ven. ex.* and the writs of *fi. fa.*, and that the plaintiff became the purchaser; and did by such deed sell to the plaintiff in fee all the right, title and interest of the defendant in the same lands.

The deputy sheriff proved also a deed of confirmation indorsed upon the foregoing deed, and dated the 3rd December, 1864, executed by the sheriff, which last deed was executed to correct an inaccuracy in the description contained in the first.

He produced an advertisement, which was first inserted in the *Canada Gazette* on the 11th of June, 1864, stating, "To be sold by public auction, all the right, title and interest of Robert Money Todd, in and to the north half of lot No. 59, on the east side of Victoria street, in the city of Toronto, as laid out on a plan by Robert F. Lynn, P. L. S., of Park lots 7 and 8" (setting forth the abbutals) "under several writs of *fieri facias*"

"Henry Abraham Joseph, plaintiff, *v.* Robert Money Tod, defendant. James Patterson and Robert A. Harrison, plaintiffs, *v.* Robert Money Tood, defendant. Wm. Wakefield and Frederick William Coate, plaintiffs, *v.* Robert Money Tood, defendant. At twelve o'clock, noon, on Saturday, the twenty-seventh day of August, A.D., 1864, at the sheriff's office, in the court house, city of Toronto."

In the *Gazette* of the 16th July, 1864, the error in spelling Todd's name was corrected, the previous five insertions having been as above set out. The advertisement was correctly inserted in the *Leader* newspaper for three months., beginning in May, 1864. The corrected advertisement was, (beginning on the 1st of October,) six times inserted in the *Gazette*, but the day of sale named therein was the 12th of November, and of this day there was no advertisement in the *Leader;* but in the *Gazette* only the day of sale was changed, and it appeared there not as a postponement, but as a new advertisement. The sale was made as a sale adjourned from the 27th of August, and a correct notice of it was put up on the usual board at the door of the court house, where all these sales are advertised.

The plaintiff's case was then closed, but on its being objected that the judgments on which these executions were founded were not proved, the learned judge allowed this defect to be supplied. The plaintiff then called a clerk in the office of the County Court, who produced the original rolls from the County Court in these three suits.

The defendant's counsel objected, that the advertisements were irregular: that the time of sale must be advertised in the *Gazette* for six consecutive weeks, and in the local paper for three months, and that the advertisement in the local paper and that in the *Gazette* were quite different. He objected also to the mode in which the judgments were proved.

Leave being reserved to the defendant to move for a nonsuit on these objections, the plaintiff had a verdict.

*McMichael* obtained a rule on the leave reserved, or for a new trial, on the law and evidence, and for misdirection, in this, that the plaintiff claimed under a sheriff's deed which was not valid, there having been no legal advertisement of the day of sale, or of the parties to the suit in which the sale was made, or of the sale itself, and so the sale was vitiated; and that the judgment was not properly proved—that being from another court, it could only be proved by exemplification. He cited *Doe Miller* v. *Tiffany*, 5 U. C Q. B. 88.

*Robert A. Harrison* shewed cause, citing *Roe* v. *McNeill*, 13 U.C. C.P. 191, 192; *The Maria das Doras*, 7 L. T. Rep. N. S 838; *Vindin* v. *Wallis*, 24 U.C. Q B. 9; *Douglass* v. *Bradford*, 8 U.C. C.P. 459; *Jarvis* v. *Brooke*, 11 U. C. Q. B. 299.

DRAPER, C. J.—I think it impossible to say that the notices of sale comply with the Consol. Stat. U. C., ch. 22. sec. 267, which requires an advertisement of sale in the *Canada Gazette* at least six times, specifying: 1. The particular property to be sold. 2. The names of the plaintiff and defendant. 3. The time and place of the intended sale; and that such advertisement shall also be published in a public newspaper of the county in which the lands lie, or that for three months a notice of such sale shall be put up and continued in the office of the clerk of the peace, or on the door of the court house or place in which the Court of General Quarter Sessions of the Peace for such county is usually holden; but nothing in the act contained shall be taken to prevent an adjournment of the sale to a future day.

Now, what are the facts? An advertisement, to the correctness of which no objection has been pointed out, was inserted in a local newspaper for three months before the 27th of August, 1864. A notice incorrect in some particulars, was also inserted in the *Canada Gazette* on the 11th of June, 1864, and in the four next ensuing weekly numbers of the *Gazette*. In the sixth insertion the errors were corrected, all six announcing the sale for the 27th of August, 1864. Then, on the 1st of October following, another notice was inserted in the *Gazette* for the sale of the lands on the 12th of November, 1864, and this is published in the five succeeding weekly numbers. It does not purport to be a postponement of the sale formerly advertised. But there was no advertisement for the 12th of November in a local newspaper, and though there was evidence that this new notice was put up at the door of the court house, it is not shewn to have been continued there for three months next preceding the sale, which I take the statute to require when there is no local advertisement.

It becomes therefore necessary to enquire whether the validity of the sale is dependant on a strict compliance with the statutory requirements as to advertising.

In *Jarvis* v. *Brooke*, 11 U. C. Q. B. 299, Robinson, C. J., observed, in effect, that upon general principles a defect or informality in regard to the notice of sale ought not to affect the validity of the sale, but should be treated merely as a direction of the statute which the sheriff is to observe at his peril, being subject to an action at the suit of the party injured if he neglects his duty in this respect, adding, "We have decided this on the principles of the common law where lands have been sold in execution." That case

related to a sale for taxes. The same opinion is virtually expressed in *Jarvis* v. *Cayley*, at p. 289 of the same volume. "A failure to give due notice would not necessarily affect the validity of the sale" * * * "Irregularity of that kind would only be an objection in the mouth of the proprietor whose land was sold, or perhaps on the part of the public who were interested in having the sale duly advertised." This case was also on a sale for taxes. The cases of *Williams* v. *Taylor*, 18 U.C. C.P. 219, and *Hall* v. *Hill*, 22 U. C. Q. B. 578 (*a*), were also upon sales for taxes.

Those decisions rest upon grounds and considerations very different from such as exist in regard to sales upon execution. The language used in *Doe* v. *Reaumore*, 8 O. S. 247, does not apply to the latter class of sales. There is no forfeiture nor accumulated penalty for alleged default. It is the compelling payment out of a debtor's property of money due to his creditor, a course equally sanctioned by the principles of the common law and by statute. The substantial matter is the recovery of the judgment and the issuing of the proper writ to the proper officer to make the money adjudged to the plaintiff. In reference to the writ there are certain statutory provisions, the language of which is unmistakably imperative, for instance "Goods and chattels, lands and tenements shall not be included in the same writ of execution, nor shall any execution issue against lands and tenements until the return of an execution against goods and chattles; nor shall the sheriff expose the land to sale within less than twelve months from the day on which the writ is delivered to him," (Consol. Stat. U. C. ch. 22, sec. 252.) The two former of these commands involve matters wholly within the power or control of the plaintiff or his attorney, and the third not much less so, for they must know the earliest day at which a sale can legally take place, and can give proper directions, which the sheriff must follow upon peril of the consequences of non-observance. But the language is less stringent with regard to advertisements—namely, "before the sale * * the sheriff shall publish." It is a positive command to him, but it is not, as in the preceding case, a positive direction as to the writ, or prohibition to its execution until a stated event has happened, for it is not said there shall be no sale until or unless the sheriff has advertised. I do not question that it may be irregular to proceed to sell without giving proper notice, but the defendant here contends that the sale so made is wholly void.

In determining this question (upon which we have found no direct decision in our own courts) we are bound to remember that ever since the Stat. 2 Geo. IV. ch. 1, sales of land have been required to be advertised in this manner, and that for upwards of forty years titles and interests in land have been sold by sheriffs in professed obedience to the law. It is in the highest degree probable that in numerous instances during all these years irregularities, errors or omissions have occured in the advertisements, and yet, so far as we are informed, there is no decision that a sheriff's sale under execution of land is invalid by reason of erroneous or defective advertisements in the *Gazette* or the local newspaper; and the language of the Chief Justice in *Jarvis* v. *Brooke* shews that there have been decisions (though unreported) the other way, where lands have been sold in execution. And though we might think that the purchaser could have little reason to complain where he was one of the execution creditors and also the attorney on record, if the proceedings were held nugatory by reason of any irregularity or omission in advertising, we think this no reason for incurring the risk of shaking other titles where the purchaser has had no such necessity or opportunity for watching the proceedings. We think we ought not, by decision given for the first time after so many years, to deter purchasers at sheriff's sales by holding it to be their duty to examine into every step of the sheriff's proceedings under a valid writ supported by a valid judgment. We should in fact be inflicting an injury on the debtor whose lands are offered for sale.

The only other point is the sufficiency of the proof of the judgment. Conceding fully that the clerk who produced the original rolls acted improperly and deserves censure, unless he was authorized by higher authority, I do not understand upon what principle the exemplification of a judgment is better proof of the existence of the judgment, than the original roll would be. No doubt has been raised as to the genuineness of the roll produced at *nisi prius*. The reason why exemplifications and examined copies of records were always admitted in evidence is thus stated by Chief Baron Gilbert, "Since you cannot have the original, the best evidence that can be had is a true copy; and the rule of evidence commands no farther than to produce the best that the nature of the thing is capable of." (Gilbert on Evidence, p. 6.) And in *Hennell* v. *Lyon*, 1 B. & Al. 182, Lord Ellenborough says, "The admission of copies in evidence is founded upon a principle of public convenience, in order that documents of great moment should not be ambulatory, and subject to the loss that would be incurred if they were removable." Records also might be wanted to be put in proof at different places at the same time. For these or the like reasons copies of the records of Courts of Record, and even of courts not of record, being properly authenticated or proved, are admitted, but this does not prove that the originals are not evidence when they can be had, and the contrary is notoriously the law on the issue of nul tiel record, when the record belongs to the court in which the issue is joined.

For these reasons I think the rule must be discharged.

Hagarty, J.—I concur in holding that the rule must be discharged. I think the general view of the profession for a long series of years has been, that any informality or non-compliance with the letter of the statute as to the advertising will not vitiate a sheriff's sale on an execution against lands, and that it never was the practice among conveyancers to institute any enquiry into the manner in which lands were advertised. It would be most unwise in my judgment to open such a wide field of enquiry into the validity of

(1) This case has since been affirmed in the Court of Appeal.

the innumerable titles to real estate sold in execution.

Morrison, J., concurred.

Rule discharged. (a)

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### Ham et ux. v. Lasher et al.

*Costs—Motion to revise—Counsel fees, &c.*

On motion by plaintiffs to revise taxation, *Held.*

1. That under the rule of court of H. T. 22 Vic., 18 U. C. R. 58, now in force, no single judge is authorized to grant an order for a larger counsel fee than the tariff specifies, nor can the Master tax and allow more as between party and party.
2. As to the sums paid to and expended by witnesses, defendant being bound to a strict compliance with the 165th rule of T. T. 20 Vic., and the Master having authority to make all such inquiries as he might deem necessary to satisfy himself, the court refused to give any directions as to such inquiries.
3. A misnomer of a witness, *David* instead of *Daniel*, would be immaterial.
4. All witnesses should be paid before taxation, and only actual disbursements proved are taxable, not mere engagements to pay.
5. No term fee is allowable unless there has been some proceeding during the term.
6. Attendance to hear judgment should only be taxed once—that is, attending when judgment is delivered.
7. Defendants could not tax the cost of enlarging plaintiffs' rule for their own convenience.
8. That service of subpœnas made by one of the defendants could not be allowed, unless such defendant held a warrant or written authority from the sheriff to act as his bailiff on the occasion.
9. That if a brief for second counsel was actually prepared, his accidental absence at the trial should make no difference
10. Plaintiff having attended under defendants' notice, without being paid, which she was not bound to do, the court refused to direct her expenses to be deducted from defendants' costs.

The question of costs of this application was reserved until after the Master's report.

[Q. B., E. T., 28 Vic.]

*J. V. Ham*, in Hilary Term last obtained a rule *nisi* for review of taxation, the application having been referred from Practice Court, and that the Master should disallow:—

1. All sums over $40 for senior counsel fees at the several trials of this cause.

2. All sums over $20 for junior counsel fees at the same trials.

3. That the Master should ascertain what sums were paid to witnesses by the defendants before taxation, and should allow no more.

4. That the Master should inquire how much was paid and expended by those witnesses for their travelling expenses, and allow no more.

5. That the Master should disallow payments alleged to have been made to David Chapman.

6. In case the Master finds that Thomas W. Nash was paid before taxation, that he should inquire as to what other case Nash attended as a witness at the several assizes at which this cause was tried, and apportion the sum to be paid by the plaintiffs accordingly.

7. That the Master should disallow term fees and attendances to hear judgment when judgment was not given, and attendances to enlarge the rule at the instance of defendants.

8. That the Master should disallow the charge for two subpœnas, respectively dated 18th October, 1861, and 18th March, 1863, and copies thereof.

9. That the Master should disallow the copy of brief for second counsel at the first trial.

10. That the Master should tax to plaintiffs the expenses of the attendance at *Nisi Prius* of the plaintiff Eliza A. E. Ham, pursuant to the defendants' notice, and set off the same against the defendants' costs.

It appeared that the defendants' bill was taxed at Kingston at £274 13s. 6d., and on revision by the Master here, was reduced to £195 17s. 0d., £78 16s. 6d. having been disallowed on revision. The bill was originally made up at £371 1s., and the deputy clerk of the Crown at Kingston disallowed £97 15s. According to the revision the bill was nearly double what it should have been.

*Robert A. Harrison* shewed cause. *Ham* supported the rule.

*Alivan* v. *Furnival*, 2 Dowl. 49; *Ward* v. *Bell*, Ib 76; *Cleaver* v. *Hargrave*, Ib. 689; *Daniel* v. *McCleland* 61; *Griffin* v. *Hoskyns*, 1 H & N. 95; *Parsons* v. *Pitcher*, 6 Dowl. 600; *Miller* v. *Thomson*, 4 M. & G 260; Har. C. L. P. A. 712, 713, 715, 716, 664; *Trent* v. *Harrison*, 2 D. & L. 941; *Cross* v. *Durrell*, 29 L. J. N. S. Ex. 473; Rule of Court, H. T. 22 Vic., 18 U. C. R. 58, were referred to on the argument.

Draper, C. J., delivered the judgment of the court.

We think the rule must be made absolute on some though not on all the grounds moved.

As to the first and second objections. The practice of granting counsel fees larger in amount than would be taxed by the Master, upon the order of the judge who tried the cause, has obtained as far back as my experience in our courts goes, and is a very old practice in England, where at an early time I believe the judges taxed the costs themselves. In the tariff of fees, published in Draper's Rules of Court, at p. 29, the Master's authority is limited to £5, and the power of the judge is expressly reserved. In the tariff of fees published after the passing of the Common Law Procedure Act of 1856, the power of the judge to increase the counsel fees which the Master is permitted to tax is limited to £20. And in Hilary Term 22 Victoria the last-mentioned rule was rescinded, and the authority to increase was given first to the taxing officer wherever the bill was taxed to allow £5 to senior counsel and £2 10s. to junior counsel, in special and important actions, subject to an appeal to the Master at Toronto, who was authorized to tax to senior counsel not exceeding £10, and to junior counsel not exceeding £5, with brief at trial, with a proviso that no more than one counsel fee should be allowed in any case not of a special and important nature. This is the rule now in force, and under it we are of opinion that no single judge is authorized to grant an order for a larger fee than the tariff specifies, nor can the Master tax and allow more as between party and party. On these two points, therefore, the rule for revision must be granted.

As to the 3rd and 4th, the defendants are bound to strict compliance with the 165th rule of Trinity Term 20 Vic., and it is open to the plaintiffs to dispute any allegations, or the propriety of any charge, by affidavit, and the Master has authority to make all such inquiries as he deems necessary in order to satisfy himself, without any direction from the court as to what these inquiries should be. Otherwise the court

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(a) See *Osborne et al.* v. *Kerr*, 17 U. C. Q. B. 134, 141-2.

must enter into all the details, and virtually tax the bill themselves.

5th. If the Master is satisfied that there is merely a misnomer, a mere error and oversight in naming David instead of Daniel Chapman was a witness, and entitled to be and was paid, the error should not deprive the defendants of the amount really disbursed.

6th. All witnesses should be paid before taxation. The Master taxes and allows actual disbursements proved, and not mere engagements to pay. The affidavit of disbursements is required to state that they did not attend as witnesses in any other cause.

7th. No term fees are allowable unless there has been some proceeding during the term. Attendance to hear judgment should only be taxed once—this is, for attendance when judgment is delivered. The defendants are not entitled to tax costs for enlarging the plaintiffs' rule for their own convenience.

8th. If this objection refers to the service made by one of the defendants of two subpœnas on their own witnesses, the charge should be disallowed, unless at the time of the service such defendant held a warrant or written authority from the sheriff to act as his bailiff on the occasion.

9th. If the copy of brief for second counsel at the first trial was actually prepared, the accidental absence of the counsel at the trial should not deprive the defendants of this charge.

10th. The plaintiff, though notified to attend as a witness, is not bound to attend unless paid, and therefore has a sufficient protection without the unusal direction asked for.

Rule absolute.

*Ham* afterwards applied for costs of the application.

*Cur. adv. vult.*

Hagarty, J.—We reserve the question of the costs of this application and of the revision until the Master makes his report. We do not intend to depart from the usual course of making no order as to costs when the necessity of applying to the court arises from an error in judgment of the courts own officers. We are not prepared however to extend a total immunity from costs to parties who, it may possibly be made to appear, have by their own erroneous statements or misconduct caused that officer to err.

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## Bank of Montreal v. Reynolds et al.

*Amendment—C. L. P. A. sec. 222—Construction of—Usury—Variance.*

Under the C. L. P. A., sec. 222, all amendments necessary to determine the real question in controversy are imperative, without reference to the character of the action or defence. The only point for the court or a judge to determine is whether they are so necessary.

In an action on promissory notes, the defence set up being usury,

*Held*, that variances in the amount stated as intended to be loaned and in the sum stated as the excess beyond legal interest, were material.

The learned judge at the trial refused to amend in these respects, desiring the opinion of the court. *Held*, that being an amendment necessary for the purpose of determining the real question in controversy between the parties, he was bound by the C. L. P Act, sec. 222, to allow it. The amendment was therefore ordered, and a new trial granted. [Q. B., E. T., 28 Vic.]

The declaration was on two promissory notes, one dated the 21st of December, 1864, for $800, payable at the Bank of Montreal at Toronto, at three months after date, made by defendant Reynolds to defendant Wilcox, or order, and endorsed by Wilcox to the plaintiffs; and the other of same date, payable also at three months, in Toronto, for $600, made and endorsed as the first note. Both maker and endorser were sued.

The defence was usury,

At the trial, at Whitby, before Adam Wilson, J.; on going into evidence, there appeared a variance in the amount stated as intended to be loaned, and also in the sum stated as the excess beyond seven per cent. The learned judge was of opinion the variance was material, though both sums were laid under a *videlicet*, but he desired the opinion of the court upon the question, and he doubted if the power should be exercised when the consequences were so serious and the defence was one of strict right. The plaintiffs therefore had a verdict.

*Robert A. Harrison* obtained a rule calling on the plaintiffs to shew cause why there should not be a new trial on both points. 1st. The materiality of the variance, the sums being laid under a *videlicet*. 2nd That the amendment was necessary for determining in the existing suit the real question in controversy between the parties, and that the statute made it imperative on the judge at *nisi prius* to grant it. He also moved in the alternative, that the amendment should be ordered by the court and a new trial be granted. He cited, as to the question of usury, *Masterman* v. *Cowrie*, 3 Camp. 488; *Carstairs* v. *Stein*, 4 M. & S. 192; *Lee qui tam* v. *Cass*, 1 Taunt. 511; *Doe Haughton* v. *King*, 11 M. & W. 333; *Derry* v. *Toll*, 5 Ex. 741. As to the variance, *Robson* v. *Fallows*, 3 Bing, N. C. 392; *Saxty* v. *Wilkin*, 11 M. & W. 622; *Farewell* v. *Dickenson*, 6 B. & C. 251; *Stanley* v. *Agnew*, 12 M. & W. 827; *Dimmock* v. *Sturla*, 14 M. & W. 758; *Ackerman* v. *Ehrensperger*, 16 M. & W. 99; *Bens* v. *Stover*, 12 U.C. Q B. 628; *Smith* v. *Trowsdale*, 3 E. & B. 83. As to the amendment, *Taylor* v. *Shaw*, 21 L. T. Rep. 58; *Ritchie* v. *VanGelder*, 9 Ex. 762; *Brennan* v *Howard*, 1 H. & N. 138; *St. Losky* v. *Green*, 8 C. B. N. S. 370, S. C., 3 L T. Rep., N. S. 297; *Cordery* v. *Colvin*, 14 C. B N. S. 374; *Doe Marriott* v. *Edwards*, 1 Moo. & Rob. 319; C. L. P. A. sec. 222, C. S. U. C. ch. 2, sec. 18, subsec. 2.

*M. C. Cameron*, Q. C., shewed cause, citing Consol. Stats. C. ch. 58; *Fox* v. *Keeling*, 1 Moo. & Rob. 66, S. C., 2 A. & E 670; *Lee qui tam* v. *Cass*, 1 Taunt. 511; *Robson* v. *Fallows*, 3 Bing. N. C. 392; *Fraser qui tam* v. *Thompson*, 1 U. C. Q.B. 522; *Ritchie* v. *VanGelder*, 9 Ex. 762; *Hughes* v *Bury*, 1 F & F. 374; *The Times Fire Assurance Co.* v. *Hawke*, 28 L. J. Ex. 317; *McKenzie* v. *Vansickles*, 17 U. C. Q. B. 226.

Draper, C. J., delivered the judgment of the court.

I have, though not without some doubt, arrived at the conclusion that the variances were material. The first, that in the amount to be loaned, was part of the contract, which must be stated with all the certainty of which it is capable, and which must be within the knowledge of the defendant Reynolds. The other I have much more

doubt about, for there is sufficient certainty of statement that the corrupt agreement was to take one-half per cent above the rate allowed by the statute for the time the note had to run, and the variance as to the amount actually taken might with the less apparent reason be deemed material.

On the other question I am free from doubt. The 222nd section of the Common Law Procedure Act, (Consol. Stats. U. C., ch. 22) enacts, that "The courts and every judge thereof, and any judge sitting at *Nisi Prius*, or for the trial of causes, *may*, at all times, amend all defects and errors in any proceeding in civil causes, whether there is anything in writing to amend by or not, and whether the defect or error be that of the party applying to amend or not, and all such amendments may be made with or without costs, and upon such terms as to the court or judge seems fit, and *all such amendments* as may be necessary for the purpose of determining in the existing suit *the real question in controversy* between the parties *shall* be so made."

The 216th and 217th sections contain also provisions as to amendments of variances, less extensive, and left entirely as a matter of discretion to the court or judge at *Nisi Prius*.

We must suppose, as by the language we find, that the Legislature meant by the 222nd section to extend the power of amendment, and this is very fully done by the first and enabling part of that section, and then follows a mandate, that "all such amendments"—an expression large enough to include all that had been previously set forth—as should be necessary to determine the real question in controversy, *shall* be made.

The words "may" and "shall" so used in the same section, plainly to my mind convey, that amendments falling within the first part are discretionary, within the latter part that they are commanded. And the 2nd subsection of section 18 of the Interpretation Act (Consol. Stats. U.C. ch 2) leaves no room for doubt, "The word 'shall' is to be construed as imperative, and the word 'may' as permissive."

The only point, therefore, for the court or a judge under this latter part of the 222nd section, is whether the amendment is necessary for the purpose stated. If it be, it is imperative to make it. The Legislature have relieved the court and judge from considering the character of the action or of the defence. They give a simple rule, the necessity of the amendment for the purpose of determining in the existing suit the real question in controversy.

I have no doubt, therefore, the amendment asked for should be made, and that the rule should be made absolute for that purpose, and that there be a new trial, the costs to abide the event, including the costs of this rule.

My brother Hagarty having had no opportunity of considering the case with us, takes no part in the judgment.

Morrison, J., concurred with the Chief Justice.

Rule absolute.

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## COMMON LAW CHAMBERS.

(*Reported by* Robt. A. Harrison, Esq., *Barrister-at-law.*)

### Moore v. Simons.

*Setting aside judgment on default of appearance—Irregularities in office of deputy clerk of Crown in mode of entering appearance—Searching files.*

Where an appearance properly entitled was filed in the office of a deputy clerk of the Crown, but was incorrectly entered in the "appearance book" by defendant's attorney, and plaintiff's attorney not taking the precaution of searching the files, was led to believe that no appearance had in fact been entered the judgment was set aside but without costs, as both parties had contributed to the mistake.

Remarks as to the irregularity and impropriety of attorneys making entries which should be made by the proper officer.

*Quere* as to the liability of such officer for damages arising from neglect in his duties in this respect.

[Chambers, June 15, 1864.]

*J. B. Read* obtained a summons calling on the plaintiff to shew cause why the judgment for want of an appearance, signed in this cause against the defendant, together with the writ of execution issued thereon, and all proceedings had therein, should not be set aside for irregularity, with costs, on the following (amongst others) ground: that such judgment was filed and signed after the defendant had duly appeared in the action. Affidavits were filed on behalf of the defendant shewing that the writ was served on the sixth of May, 1864, and that an appearance was filed in the office of the deputy clerk of the Crown at Hamilton on the day following, a copy of which appearance duly entitled in the court and cause was put in.

*Osler*, contra, filed affidavits in reply, to the effect that a book called "The Appearance Book" was always kept in the deputy clerk's office, and lay there on the counter; and that the deputy clerk, or the attorney entering the appearance also entered in this book a memorandum to the following effect, "—— v. — —, appearance, A. B., attorney;" that when an appearance was found entered in the Appearance Book, an inspection of the appearance itself was seldom required, and if not found in this book that the files of the office were rarely searched; that in this case the clerk of the agent of the defendant's attorney, who filed the appearance, entered it in the book referred to as "*Moore* v. *Ferguson*," instead of *Simons* (the defendant's name being *Norval Ferguson Simons*). The plaintiff's attorney swore distinctly that his attention was not drawn to the error, and that he signed the judgment *bonâ fide*, believing that the defendant had not appeared. No request was made by the defendant's attorney to the plaintiff's attorney before this application to waive the judgment.

The following authorities were cited by counsel:—Con. Stat. U. C. ch. 22, sec. 53; *Street* v. *McDonell*, 2 U. C. Prac. Rep. 65; *Great Western Railway Co.* v. *Buffalo and Lake Huron Railway Co.*, *Ib.* 133.

John Wilson, *J.*—When the defendant entered his appearance he had done all that the statute required him to do. The duty of the deputy clerk of the Crown was to enter it in the appearance book. If the clerk of the agent of the defendant's attorney who filed it had not, according to a practice which has improperly obtained in Hamilton, as I am informed, assumed to enter

it in the book, and there incorrectly entered it, I should not have hesitated to set aside this judgment and made the plaintiff pay the costs. I cannot give countenance to a practice so objectionable as to allow the duties of the deputy clerk of the Crown to be performed by any one who may happen to bring an appearance to the office.

The incorrect entry of the appearance in the book, and the alleged information to the plaintiff by the deputy clerk of the Crown, "That no appearances had been entered except those in the book," appear to have led the plaintiff to believe that no appearance had been filed, and so he entered judgment and issued his execution.

The duty of the officer of the court admitted of no doubt. He was bound to enter the appearance in the book as soon as it was filed, and he ought not to have allowed the person who filed it to make the entry in the book. When he was required to enter the judgment his duty was to see that no appearance had been filed. His omission to do this contributed to the mistake, for it seems here to be admitted that the defendant did file his appearance. The deputy clerk of the Crown is not before me, being no party to this proceeding. It will therefore rest with those who are injured to consider how far he is answerable for his apparent share in the mistake.

Under the circumstances, I think, I shall best promote the ends of justice by ordering the judgment to be set aside without costs. The plaintiff will thus be made to pay for his want of caution in not requiring the files to be searched before he signed judgment. The defendant will bear his share of the loss in paying his costs of this application, for the officiousness of his agent in meddling with what he had nothing to do, and so meddling as to lead the plaintiff astray.

In conducting proceedings gentlemen will find it best to manage what properly belongs to them and no more.

Order accordingly.

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## Moor v. Boyd et al.

*Change of venue—Principles which guide the court in applications for—Special grounds.*

The plaintiff is *dominus litis* and entitled to lay the venue where he pleases, subject to the rules of court.

The court will not deprive the plaintiff of the right to lay the venue where he pleases, unless there is a manifest preponderence of convenience in a trial at the place to which it is sought to be changed.

If it be made to appear that there will be a great waste of costs in a trial of the cause at the place where the venue is laid, and much saving of costs in trying it at the place where it is sought to change the venue, the judge is at liberty to exercise his discretion in the matter, and to make the order if he sees fit.

In this case the judge was not satisfied that there would be a waste of costs by reason of the trial in the county where the venue was laid, and so on that ground he declined to change the venue.

The suggestion that the defendants could not obtain a fair and impartial trial in the county was not made out to his satisfaction, and on that ground, as well as others mentioned in the case, he refused to interfere.

[Chambers, March 28, 1865.]

*Burns* obtained a summons to change the venue from the County of Stormont to the County of the City of Toronto, on the ground that the cause of action arose in the City of Toronto, and the defendants witnesses reside at or near there, and the great additional expense of a trial at Cornwall, and the inability of the defendants to get a fair and impartial trial there, or to get a jury of tobacco manufacturers or merchants, and why the cause should not be tried by a special jury of tobacco manufacturers or merchants, or others skilled in the manufacture and quality of tobacco, and why for that purpose a writ of *venire facias* should not issue directed to the sheriff of the United Counties of York and Peel, if the *venue* be so changed, or if not to the sheriff of the United Counties of Stormont, Dundas and Glengarry.

The affidavit of the defendant Arthurs was filed on moving the summons. He stated that the cause of action, if any, arose in the city of Toronto and not in the county of Stormont. That the defendants had a good defence on the merits. That it would be necessary for defendants to subpœna not less than between twenty and thirty witnesses to support their defence; that they are material and necessary for that purpose; that the defendants intended to subpœna them; that the witnesses all reside in Toronto and Hamilton, and in the neighbourhood of those cities, except two who reside in Cobourg and Whitby respectively, and that none of them reside in Stormont. That all plaintiff's witnesses, as he believed, reside in Montreal, where their evidence could be taken under a commission. That the expense of subpœnaing and procuring the attendance of the witnesses at the trial at Cornwall would be at least $220 more than if the trial took place in Toronto. That a former action in relation to this claim was tried at Cornwall at the Fall Assizes of 1863; that deponent was present thereat for several days: that from what he then saw of the town and the jury, and the influence brought to bear on them by plaintiff, especially through some of the witnesses boarding at the same tavern where numbers of the jurors stopped, in circulating tobacco amongst them, as he was informed, and prejudicing their minds against the defendants, he verily believed the defendants could not and would not get a fair and impartial trial at Cornwall. That from the magnitude of the amount in dispute on the former trial, and the number of witnesses on both sides (being about forty), the cause was universally known and talked about in a small place like Cornwall; that the deponent was told and believed a prejudice was endeavoured to be got up by or on behalf of the plaintiff against the defendants, by it being represented that the reason defendants refused to receive the tobacco was on account of the fall in the price of tobacco and not because of its being a bad and not equal to the Union Jack brand (which it was to be); that the same would occur again in this cause he verily believed. That the Hon. J. Sandfield Macdonald was the plaintiff's counsel on the former trial, and is the plaintiff's attorney, and would, as deponent believed, be his counsel on the coming trial; that his influence in Cornwall and in the United Counties of Stormont, Dundas and Glengarry, both on his own account and his long residence therein, and being a member of Parliament for Cornwall or some of the counties aforesaid now and for so long before, and also speaking the Gælic language, which most of any jury to be got in said counties also speak is so great that the deponent verily believed it to be

utterly impossible on that account alone for the defendants to get a fair and impartial trial at Cornwall; that his influence is so great that it is almost a proverb that no stranger not living in said counties when he is opposed to him can get a verdict there even though entitled to it; that if the trial of this cause takes place then he deponent believed the defendants were certain to lose the verdict, whereas they are entitled to a verdict. That he deponent believed the case can only satisfactorily be tried by a jury of tobacco manufacturers, or of those engaged in the manufacture of tobacco or in the buying or selling thereof, as such a jury can only rightly understand the questions involved in the cause, and give a proper decision therein, and justly weigh and decide on the evidence; that such a jury cannot be got in the united counties as the deponent was advised and believed, but can be got in Toronto. That from the foregoing and other causes the deponent believes a fair and impartial trial could not be had in Cornwall; that the application is not made for purposes of delay but solely to save additional expenses and get a fair trial. That from the number of witnesses in the cause and persons attending court at the former trial, he, deponent, and a number of the defendants witnesses could only get accommodation at a private house, and that of an inferior sort.

The affidavits of six other persons who were probably witnesses for the defendants on the former trial, were also filed, they using almost the identical words of Mr. Arthurs, stated their opinion that the defendants could not get a fair trial in Cornwall for the following reasons:

1. The influence brought to bear on the jury by plaintiff through some of his witnesses boarding at the same tavern where four of the jurors at the former trial boarded, in prejudicing their minds.

2. The case being known and talked about in a small place creating a prejudice, by representations that defendants refused to receive the tobacco because of the fall in the price of the article.

3. The influence of Hon. J. S. Macdonald, and his speaking Gælic, rendering it impossible for a stranger to get a verdict when he is on the other side.

4. The case can only be satisfactorily tried by a jury of tobacco manufacturers or of those engaged in the manufacture of tobacco, or the buying and selling thereof; and such a jury could not be had in Cornwall but can in Toronto.

A further affidavit by William Murray of the City of Toronto, wholesale grocer, was also filed by the defendants. In this affidavit the first and third grounds mentioned in the other affidavits as above mentioned were struck out.

*W. S. Smith* shewed cause. He filed, on behalf of the plaintiff: 1. The affidavit of the latter, stating that the town of Cornwall is the nearest place where the assizes are held to the city of Montreal, where all his witnesses reside. That he would require and have in attendance at court on the trial of the cause about forty witnesses to testify to the quality of the tobacco; that the witnesses are persons who were in his employ when the tobacco was being manufactured, and also merchants and tobacco dealers in the city of Montreal to whom he sold the same quality and brand of tobacco as that sold to defendants. That it would be necessary for his witnesses in giving evidence to see the tobacco that will be produced at the trial in order to speak of its quality. That the additional expenses of having the case tried at Toronto instead of Cornwall would be $600, and that great additional expense would be incurred in trying this cause at any assize town further from Montreal than Cornwall.

2. The affidavit of John B. McLennan, the partner of the attorney for the plaintiff, who stated he has resided in Cornwall for ten years, attended nearly all the assizes in that town during that time; that he was not aware nor did he believe that defendant Arthurs, or the other defendants whose affidavits were filed on this application by defendants, ever attended an assize in the said town either as witnesses, or plaintiffs, or defendants, except in the cause against the defendants tried in November, 1863, and that was the only opportunity they ever had of judging of jurors in the United Counties of Stormont, Dundas and Glengarry.

Richards, C. J.—The present Mr. Justice Willes when at the bar stated, *arguendo*, in *De Rothschild* v. *Shilston*, 8 Ex. 503, "the plaintiff is *dominus litis*, and entitled to lay the venue where he pleases, subject to the rules of court."

In giving judgment, Pollock, C. B., said, "The general rule on the subject may be thus stated: the application to change the venue may be made either before or after issue joined, as may be most convenient to the parties in the proper conduct of the cause. If the application be made before issue joined it is required that the party applying should state in his affidavit all the circumstances on which he means to rely. He will not be allowed to add to or amend his case when cause is shewn. It will be sufficient however for him to rely on the fact, that the whole cause of action arose in the county to which he desires to change the venue, but if he does so he may be answered by any affidavits negativing this fact, or shewing that the cause may be more conveniently tried in the county where the venue is laid. If made after issue joined the affidavits in support of the application must shew that the issues joined may be more conveniently tried in the county to which the party applying proposes to change the venue. Of course the affidavits are open to answer by the other party. In all these cases the court or judge will decide, after hearing both sides, whether the venue is to remain or be changed as prayed, or be made in some third county according to its discretion."

In *Helliwell* v. *Hobson et al.* 8 C. B. N. S. 761, the head note of the case is, "the court will not deprive the plaintiff of the right to lay the venue where he pleases, unless there is a manif st preponderance of convenience in a trial at the place to which it is sought to be changed."

In *Durie* v. *Hopwood*, 7 C. B. N. S. 835, the head note reads, "the court will not change the venue from the place the plaintiff has thought fit to lay it unless there be some great and obvious preponderance of convenience in trying it elsewhere."

Therefore in a breach of warranty on a sale of horses at Liverpool the court refused to

change the venue from Middlesex to South Lancashire, upon affidavit stating that the defendants witnesses all resided at Liverpool and in Ireland, the affidavits in answer stating that the plaintiffs witnesses, scientific men and others, all resided in or near the place where the venue was originally laid.

In giving judgment in this case Willes, J., referred to *Helliwell* v. *Hobson*, and intimated when the question decided in that case arose again it would require further consideration.

In *Jackson* v. *Kidd*, 8 C. B. N S. 354, Byles, J., said, "To induce a judge to make an order (to change the venue) three things are necessary: First, that the defendant's witnesses reside at the place to which it is sought to change the venue. Secondly, that the plaintiff's witnesses also reside there. Thirdly, that the cause of action arose there."

Erle, C. J., in giving judgment, said, "the principle on which the judges have been guided since the passing of the Common Law Procedure Act of 1852 is this, that if it be made to appear that there will be a great waste of costs in a trial of the cause at the place where the venue is laid, and much saving of costs in trying it at the place where it is sought to change the venue the judge is at full liberty to exercise his discretion in the matter and to make the order if he sees fit."

*Schuster et al.* v. *Wheelwright* 8 C. B. N S. 333, was an action brought against the captain of a vessel for conversion of a bag of specie. The vessel was out at sea; two bags of specie had been shipped on board of her, and the specie being taken on board another vessel at sea it was agreed between the captain of the burned vessel and the salvor that it should be referred to a gentleman at Liverpool what should be awarded for salvage. He awarded the salvor one of the bags. In an action against the captain the venue was laid in London. On application to Crompton, J., at Chambers, he ordered the venue to be changed to Liverpool on an affidavit, that the plaintiff's cause of action, if any, did not arise in London or Middlesex, that it would be absolutely necessary for the proper defence of the action to adduce the evidence of several witnesses, some of whom resided at Whitehaven in Cumberland, and others near Queenstown in Ireland. That it would be attended with great and needless expense to defendant for necessary travelling expenses and loss of time of such witnesses attending the trial if tried in London. That the trial at Liverpool would be at considerably less cost, as it could be reached by steamer both from Queenstown and Whitehaven, and that the trial being of a mercantile character it would be conducive to a fair trial to hold the same in Liverpool.

The court was moved to rescind the order on the ground that the affidavit did not warrant the change of venue. Byles, J., on the argument, said, "There certainly is no reason that I can see why the cause should not be tried at Liverpool rather than in London. The plaintiff's counsel contended that a plaintiff had a right to lay the venue where he pleases, and the court will not interfere to deprive him of that right unless there is a manifest preponderance of convenience in a trial at the place to which it is sought to change the venue."

Erle, C. J., "Where a judge has exercised a discretion in the matter the party seeking to impugn it should shew the court some clear reason for thinking it had not been well exercised."

The plaintiff's affidavit shewed he had several witnesses who resided in London, and the removal of the cause to Liverpool would entail upon the plaintiff the necessity of employing fresh counsel. It was manifest, therefore, that convenience as far as the plaintiff was concerned greatly preponderated in favor of having the cause tried in London.

Erle, J., in giving the judgment of the court said, "Without saying what would have been my opinion if this had been an original motion to change the venue, I think the learned judge having in the exercise of his discretion made the order, the burthen of shewing that he has acted under a misconception is cast upon the plaintiff; he has failed to do this, and the rule must be discharged."

I shall consider the change of the venue in relation to the question of the expense of trying the cause in Toronto instead of in Cornwall. The plaintiff expects to have in attendance about forty witnesses, all of them residing in Montreal, about five hours run by rail from Cornwall, a distance of sixty-seven miles. The defendants state they have between twenty and thirty witnesses residing in Toronto and the neighbourhood, distant 266 miles from Cornwall. If the plaintiff's forty witnesses were obliged to come from Montreal to Toronto they would require to travel 333 miles. The defendants say their additional expenses in trying at Cornwall would be about $220. Plaintiff says his additional expense in trying the case at Toronto would be upwards of $600. As to expense then it seems largely in favor of allowing the venue to remain where it is. It is suggested, however, that plaintiff's witnesses may be examined under a commission and the expense thus be saved. I think, however, in a case like this when the question is as to the quality of a manufactured article, the evidence taken on a commission would not be satisfactory. It would not be accompanied by that immediate reference to the samples to be compared and ready explanations that would be approved by a *viva voce* examination. I think the plaintiff not unreasonable in saying it would not be safe for him to rely on testimony taken under a commission.

The next argument as to convenience is, that it will be necessary to have a view of the tobacco disposed to defendants, and that cannot be had at Cornwall, as it is now in defendants warehouse here. I apprehend that enough of the article for all practical purposes on the trial can be forwarded to Cornwall at small cost. It is not in the nature of a fixture, and can readily be forwarded to Cornwall, the whole of it if necessary, I should suppose, without increasing the expense so as to make it range up to the difference of cost suggested by the plaintiff that would occur in trying the case at Toronto.

The next point of convenience is, that so large an influx of people takes place in Cornwall during the sittings of the Superior Courts that the additional accommodation required for defend-

ants and the witnesses cannot be obtained there. I should think this difficulty might be obviated by an early application to the innkeepers, and if a special jury is struck the court would probably fix a day for the trial of the cause, so that it would not be necessary to bring the witnesses there before that day. I cannot say that I feel pressed with this argument.

In *Hawthorn* v. *Denham*, 3 Irish Law Rep. 1, the court refused to change the venue to enable the parties to obtain a venue where a much stronger case was made than in this cause.

On the question then, that as the cause of action arose here and defendants witnesses reside here the cause can be more conveniently tried at Toronto, I am against the defendants, for I think as the plaintiff has much the larger number of witnesses residing in Montreal, when. if a day is fixed for the trial they may be brought up in four or five hours, the balance of convenience and expense is much in favor of not changing the venue.

The remaining question as to getting a fair trial at Cornwall still remains to be considered. The first objection is, that plaintiff's witnesses and others converse in presence of the jurors on the subject and inculcate the erroneous notion that defendants refused to take the tobacco that plaintiff manufactured for them because the price of the article had fallen and not because of its bad quality. As to this ground, I suppose, if these witnesses were unscrupulous enough to do this in Cornwall they might do so in Toronto; and it further presumes what I am unwilling to admit without clear evidence of the fact, that intelligent jurors would allow themselves to be influenced by any such considerations as these. It will hardly be urged that this objection will apply to a special jury which the defendants now seek to have struck.

The next is, that the plaintiff's counsel and attorney is a member of Parliament representing one of the constituencies in those united counties, and that he has done so for many years past; and in addition thereto he speaks the Gælic language, which is the mother tongue of many of the jurors, and therefore the jury will give a verdict to his client when it really ought to be given for the defendants.

I have not met with any case at all approaching this as a ground for changing a venue. I find when an action was brought against the managers of a bank it was urged that there were a great many stockholders of the bank scattered through the county to which it was sought to change the venue, and that many of the leading inhabitants transacted their business with the bank, and in that way there might be a prejudice in favor of the defendants themselves. I have never heard it urged that because an advocate had great influence with the jurors that that was a ground for changing the venue. If so, I apprehend. when Sir James Scarlet was at the bar and retained against a defendant it might have been urged that his influence with the jury on particular circuits was so great that defendant could not get justice done him, and therefore he ought to have a change of the venue. I have not met any case in which the application has ever been made on such a ground. If the defendants put their case before a jury and justice is not done them the court always have the corrective power of granting a new trial to secure the ends of justice.

If the case be one requiring a larger amount of intelligence and a more careful selection than is usually possessed by a common jury, the defendants may obtain a special jury; and I am unwilling without the clearest possible evidence to justify it to cast such a reproach on the integrity and intelligence of the inhabitants of the United Counties of Stormont, Dundas and Glengarry, as to suppose they cannot try a case in which Mr. J. S. Macdonald is an advocate, and do justice to the party to whom he is opposed. The language of some of the judges in *Dowling* v. *Sadlier*, 3 Ir. C. L. Rep., at pp. 606 and 608, seem to me appropriate to this case:

Chief Justice Lefroy said, "Because it is suggested that a feeling existed * * * * is that to be made the ground for the civil excommunication of the special jury of the whole county? * * * * Ought the county to be stigmatized upon any such allegations?" The learned Chief Justice refers to the language of Mr Justice Wilmot in *Rex* v. *Haine*, 3 Burr. 1330, when he said, "it is only *supposed conjectured* they 'verily believe' that there cannot be a fair and impartial trial by a jury of the city. Nor in the nature of the thing can such s suggestion be credited. It does not follow that because a man voted on one side or on the other he would therefore perjure himself to favour that party when sworn upon a jury." Moore, J., in the same case said, "it would at all times require a very strong and clear case to induce me to say that a fair trial could not be had in any county in Ireland. I would be slow to say that if a man were interested in a matter of a political and exciting description he would therefore neglect his duty."

As to striking a special jury of tobacco manufacturers from those who are not witnesses in the cause I fancy that would be almost as difficult in Toronto as in Cornwall; then if the qualification be extended to those who deal in the article of tobacco by buying and selling, I think there is hardly a general dealer in the United Counties of Stormont, Dundas and Glengarry who does not buy and sell tobacco more or less.

On the whole I do not see my way clear in changing the venue as desired by the defendants, and that part of the summons will be discharged with costs to the plaintiffs to be costs in the cause.

As to the other branch of the summons I do not understand that it is opposed, and therefore the order will go.

I may mention, that I understand Mr. Justice Hagarty, when applied to in Chambers, refused to grant the summons to change the venue on the grounds stated in the defendant's affidavits.

I have looked at many more cases than those I have quoted from, but I thought it better to refer to those of the latest date, containing the views of the judges on this question of venue, so far as necessary to be considered in settling the questions presented on this summons.

Summons discharged.*

* See also *Chapman* v. *Parkhouse*. 13 C. B. N. S. 341; *Blackman* v. *Barnum*, 15 C. B. N. S. 432; *Brown* v. *Clifton*, 10 W. R. 86; *Ex Cale* v. *The Hull Dock Co.* 11 W. R. 284.

## Leslie v. Forsyth et al.

*Costs—Superior Court scale—When plaintiff entitled to—Money paid into Court.*

Where, after plaintiff commenced his action in the Superior Court, defendant paid the sum of $152 in full of the suit which plaintiff accepted less costs, to be paid when taxed or agreed upon, it was *held*, that plaintiff under the circumstances was entitled to an order for full costs, the same as if the money had been paid into court.

[Chambers, March 31, 1865.]

Plaintiff obtained a summons calling on defendants to shew cause why plaintiff should not be allowed full Superior Court costs according to the scale of the Superior Courts, on grounds disclosed in affidavits and papers filed.

The action was brought by plaintiff against defendant Forsyth, a clerk of a Division Court and his sureties, under Con. Stat. U. C. ch. 19, secs. 26, 27, for non-payment of money collected by the clerk for plaintiff, an execution creditor.

Defendant not having pleaded, plaintiff signed judgment in default of a plea.

Plaintiff afterwards accepted $152 in full of his claim in the suit except the amount due for costs, which defendant agreed to pay when taxed or agreed upon.

The costs were afterwards taxed according to the Superior Court scale, but defendants contended that plaintiff was only entitled to County Court costs, and refused to pay the amount taxed. Thereupon plaintiff, with a view to the recovery of the costs, served notice of assessment, entered the record for assessment, and assessed damages at 1s.

*Robert A. Harrison* shewed cause. He argued that the case was one which was clearly of the proper competence of the County Court (Con. Stat. U. C. ch. 19, secs. 26, 27, ch. 15, s. 17), that the agreement to pay costs when taxed or agreed upon had no reference to any particular scale of taxation but only to lawful costs, which the costs taxed were not (*Keep* v. *Hammond*, 9 U. C. L. J. 157), that plantiff by serving notice of assessment had abandoned the taxation of costs and thrown open the whole matter, and that the amount recovered being within the jurisdiction of the County Court the *onus* was upon plaintiff to shew that the cause was a proper one to be withdrawn from that court, which he failed to do.

*G. D'Arcy Boulton*, in support of the summons, argued that the cause was a proper one for a certificate, and that under any circumstances defendants having paid $152 damages on the suit had admitted plaintiff's right to bring the suit in the Superior Court as much as if the money had been paid into court, and so was entitled to the certificate.

Richards, C. J.—I think plaintiff is in the same position as if the money had been paid into court, the effect of which, I take it, would be to admit plaintiff's right to full costs. I do not think that either the Con. Stat. U. C. ch. 22, sec. 328, or the rule of court as to costs has any application to such a case. So under all the circumstances I have made up my mind to grant the certificate, but without costs of the application.

Order accordingly.

## ELECTION CASES.

(*Reported by* Robert A. Harrison, Esq., *Barrister-at-Law.*

### Reg. ex rel. Blakeley v. Canavan.

*Con Stat. U. C., cap. 54, s. 70—Sufficiency of real property in respect whereof to qualify—Incumbrances—Effect thereof.*

*Held*, 1. That the real property in respect of which a candidate for the office of alderman in a city qualifies, may be of an estate either legal or equitable.

*Held*, 2. That the estate need not be free from incumbrances.

*Held*, 3. That if incumbered, and after deducting the gross amount of the incumbrances from the assessed value of the premises, there be still left a sufficient annual value in respect of which to qualify, that the qualification is sufficient.

[Common Law Chambers, February 27, 1865.]

On the 11th day of February last, an order was obtained for a writ of summons in the nature of a *quo warranto* directed to the defendant to show by what authority he exercised the office of alderman for St. Patrick's Ward, in the city of Toronto, and why he should not be removed from the said office.

The relator objected to the election of the defendant on the grounds—That the defendant was not at the time of the election possessed of the necessary property qualification for alderman; that at the time of the taking the last assessment for the city he was not then the owner of the property on which he claimed to qualify as freehold, and that he procured the said property to be rated in his name for the purpose of giving an appearance of qualification, being, in fact, not the owner or entitled to qualify therein, and never beneficially interested therein, and that if at any time he was beneficially interested therein, he was not at the time of his election beneficially interested to an amount sufficient to qualify him; that any estate which remained in him at the time of the election was not freehold, and insufficient as leasehold, both in value and estate; that the equity of redemption, if defendant was beneficially entitled thereto, was insufficient in value, and was not rated in respect thereof, and that the value of the leasehold in defendant's name was insufficient to complete his qualification.

In support of the statement and writ two affidavits were filed, that of the relator and of the assessor of St. Patrick's Ward.

It appeared from the affidavit of the relator that on the last revised assessment rolls for the city of Toronto the defendant was rated for premises on Strachan street, as owner of the annual value of $240, and as occupant of certain leasehold premises rated at $160 (regarding the latter no objection was taken); that the premises on Strachan street, on which ten dwelling-houses are erected, consists of lots 1, 2 and 3 on block B, west side of that street. That from memorials in the registry office it appears that at the taking of the assessment for 1864 the legal estate in these lots was vested in Captain Strachan. That he conveyed the same by deed, dated 18th August, 1864, to Mrs. Mary Ann Nixon, sister of the defendant, who mortgaged the same by deed dated 27th August, to the Western Canada Building Society, for $500, and that she also by deed dated the 23rd August, but not registered until 10th December following, conveyed the premises to defendant, subject to the

mortgage; and that the defendant, by deed dated 1st December, 1864, mortgaged the premises to one Hime for £275, payable in three years; both of which mortgages appear not to be discharged, and the relator stated his belief that the premises were not equal in value to the amount of the mortgages, and that he was informed that Capt. Strachan had contracted to sell the lots to one Baines, from whom Mrs. Nixon acquired her interest therein, but that the purchase money was not paid to Captain Strachan until after the taking of the assessment, and about the date of the deed to Mrs. Nixon. He also swore that he was informed the defendant is in insolvent circumstances, and that defendant never was beneficially interested in the premises in question.

The affidavit of John Clarke, one of the assessors for St. Patrick's Ward for the years 1863 and 1864, verified extracts from the assessment rolls for these years, showing the manner and in whose names the property in question was assessed. In 1863 it appeared to have been assessed in the name of Ann Canavan and Thomas Barry and John Canavan, trustees. In 1864 it was assessed in the sole name of the defendant. Clarke swore that in 1863 it was assessed at the request of defendant in his defendant's name, for a Mr. Canavan; that in the month of March, 1865, the assessors assessed the premises in the same way, but that subsequently defendant told them that he wished his name inserted as owner, which was done in April, 1864. and before they had completed their assessment of the ward, and the same was so returned to the City Clerk on the 1st of May following, as required by law.

*Robert A. Harrison* shewed cause and read and filed several affidavits on the part of defendant. The defendant swore that in March, 1863, he purchased the premises on Strachan street, from Captain Strachan, getting a bond for a deed; that in August, 1864, Captain Strachan informed him that if he paid the balance then due he would allow him a discount; that in the same month he made an application in (his sister's) Mrs. Nixon's name to the Building Society for a loan of $500, with a view of paying Captain Strachan; that upon the request of the defendant and with his sister's consent, Captain Strachan conveyed to her the lots in fee; that Mrs. Nixon executed the mortgage to the Society; that the sole reason of the deed being so made to Mrs. Nixon was in consequence of an arrangement between defendant and the Secretary of the Society, in which the mortgage was to be given in a third party's name, he (the defendant) executing a bond to the Society as additional security for the same. That on the 23rd August Mrs. Nixon, by deed, conveyed the premises to defendant in fee; that on the 1st December last, he (defendant) executed a mortgage on the premises to one Hime for £275. The defendant swore that this was solely executed as a security to Hime to take effect only on his (defendant) receiving from Hime two mortgages which Hime held as collateral security for advances made by Hime to the defendant and some of his clients; that he had not then, nor has he since withdrawn the two mortgages, and that they still remain in Hime's possession; and he further swore that at the time of his election Hime had not the slightest claims on the mortgage for £275, or on the premises contained therein; and he also swore that he did not cause himself to be assessed for the property for the purpose of giving himself a qualification, but solely on account and for the sole reason that at the time he was sole owner of the property, and that he is still owner.

James McGill Strachan swore that he being the owner in fee of the property in question in March, 1863, gave a bond for a deed for the same to defendant conditional on payment of £140, within three years, to execute a conveyance thereof to defendant; that in the month of August, 1864, he suggested to the defendant that he would allow him a discount if he would take out his deed for the lots; that in same month defendant applied for the loan referred to; that he (Strachan) executed a deed to Mrs. Nixon for the purpose as understood between defendant and himself of Mrs. Nixon executing the mortgage to the Society for the loan; and that he (Strachan) received the proceeds of the loan, and he further swore that he is satisfied that at the time of the last assessment and at the time of defendant's election defendant was possessed of the property in question to his own use and benefit.

Mrs. Nixon swore that she accepted the deed and executed the mortgage at the instance of the defendant, and afterwards conveyed the property to defendant, as stated above, all of which was done for the sole purpose of facilitating the loan, and that she had no interest whatever in the property.

H. L. Hime swore that in December last defendant requested him to hand over to him (defendant) two mortgages amounting to about £300, which defendant had deposited with him as collateral security for notes discounted, for the purpose, as he stated, of filing bills to compel payment of the amounts secured by them, and that the defendant proposed substituting in lieu thereof a mortgage on property of his own; that he (Hime) consented, and that defendant on the 10th Dec. last delivered to him a mortgage made by himself for £275 on the property in question; he swore that defendant did not take away the two mortgages, but merely took an indenture of assignment of the same, from which defendant said he could obtain the particulars of the two mortgages; and he further swore that at the time of defendant's election, and when he subscribed his declaration of office in January last, although the mortgage was in his office and registered, that he did not hold it other than as he (Hime) terms it, as an escrow, and that he had no claim whatsoever against the same, or the properties therein mentioned, and he stated that the defendant had not since taken away the mortgages.

Mrs. Ann Canavan swore that she never had any estate in the premises in question, and that she always understood it to be defendant's property.

Thomas Barry swore that he is a co-trustee with defendant by virtue of a power in a deed of trust made in 1856, between A. Burnham, of Cobourg, and the defendant; that he does not hold or ever held as trustee or otherwise for Ann Canavan, named in such trust deed any property on Strachan street, and verily believes

that she has not or ever had any property there; that he was appointed a trustee in 1862, and is still acting as such.

William B. Canavan swore to Barry and defendant being the trustees aforesaid; that he had consulted from time to time with his mother, Ann Canavan, the *cestui que trust*, regarding securities held by the trustees for her benefit. That some time in 1863 defendant represented to Mrs. Canavan that he had purchased the property on Strachan street from Capt. Strachan, and requested her to allow it to be held as part of her trust property, and to allow him (defendant) an amount of money for the same; that Mrs. Canavan declined to accede to such proposal, or accept the same, and that she did not accept it, and that she has no interest in it, and stated that she had just reason to believe that the property is defendant's. He also conducted the making of the assignment to Mrs. Nixon for the person already mentioned, and that she executed the deed in his presence to defendant, and swore that the property from the time defendant purchased from Captain Strachan was his to the present time.

*C. S. Patterson* and *Lauder* for the relator.

Morrison, J.—Under the 70th clause of the Municipal Act the persons qualified to be elected aldermen in cities are residents who have at the time of the election in their own right, &c., as proprietors or tenants freehold or leasehold property, rated in their own names on the last assessment roll to at least in freehold to the annual value of $160, or leasehold to $320, and so in the same proportion in case the property is partly freehold and partly leasehold, and the clause defines the term leasehold to include a tenancy for a year or from year to year, and that the qualifying estate may be either legal or equitable.

As it is admitted here that the property in question was assessed in the name of the defendant, and was rated, on the last assessment roll at a sufficient amount to qualify him for the office, the only question to be determined is whether at the time of his being so assessed, and at the time of his election, the defendant was possessed of an equitable estate on the premises. Upon the argument Mr. Patterson pressed upon me that taking the mortgage of $500 and the mortgage for £275 into account, and assuming the latter to be a subsisting mortgage and a charge on the property, the defendant had not such an interest in the property as was sufficient to qualify him within the meaning of the act. With regard to the £275 mortgage—when I consider the circumstances sworn to by the defendant and the mortgagee, under which the mortgage was made and the sworn disavowal of all claim and interest therein mentioned, and that that disavowal is based upon the fact that the purpose for which the mortgage was made was never carried into effect: if it were necessary for me to determine the point, I would hold that it was no encumbrance on the property.

The 70th enacting clause is silent as to encumbrances. If the Legislature intended that the qualifying property should be encumbered, or if encumbered, to be reduced for qualification purposes proportionably, it is not unreasonable to suppose that it would have so enacted in express words. We find the Legislature so speaking in other statutes with reference to property qualification for members of the Legislature, justices of the peace and others, where the amount is stated to be over and above all incumbrances thereon. The concluding words of the clause, declaring the estate may be either legal or equitable, in my judgment points among other estates, to that which is subject to incumbrances.

But even if I held that the amounts of the two mortgages were both to be deducted from the assessed value of the premises with a view of ascertaining whether the defendant had a sufficient qualification, it still appears he is sufficiently qualified. The assessors having rated the property at $240 annual value, I must assume that it was assessed as being of the value of $4,000, and deducting $1,600, the amount of the two mortgages, would leave $2,400 as the rateable interest of the defendant, giving an annual value of $144, which, being added to $80, half of the annual value of the rated leasehold property, would make $224—more than sufficient to qualify the defendant for the office to which he was elected.

On the whole case, and from all the facts disclosed upon the affidavits filed by the relator and on the part of the defendant, I am of opinion that at the time of the defendant's election as alderman he was possessed as proprietor of equitable estate in the premises sufficient to qualify him for the office; and that the office of alderman for St. Patrick's Ward, in the City of Toronto, be allowed and adjudged to the defendant, and that he be dismissed and discharged from the premises charged against him, and do recover his costs of defence.

Order accordingly.

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Regina ex rel. Hartrey v. Dickey.

*Con. Stat. U. C. cap. 54, sec. 70—Qualification of aldermen in cities—Declaration of office.*

Where a person elected alderman of a city made a declaration of office, inadvertently qualifying upon property in respect of which he was not entitled to qualify, but was before and at the time of the election, and at the time of the issue of the *quo warranto* summons against him, qualified in respect of other property, his election was upheld.

[Common Law Chambers, Feb. 27, 1865.]

On the 14th February last, an order was obtained for a writ of summons in the nature of a *quo warranto*, directed to the defendant, to show by what authority he exercised the office of alderman for the ward of St. Patrick, in the city of Toronto, and why he should not be removed from the said office.

The relator's objections were the following:—1st, that the defendant had not the necessary qualifications at the time of the taking the last assessment for the city—that is, he was assessed, with two others, his partners, for $195, annual value of an iron foundry, and for a vacant lot on Beverley-street at $67; 2nd, that the defendant was not the owner in fee simple of the land and premises set out in his declaration of office; 3rd, that the vacant lot mentioned in defendant's de-

claration of office is not his property, and that the other lands mentioned in the declaration are heavily incumbered with mortgages to the amount of £700 and upwards.

In support of the relator's statement, only one affidavit (his own) was filed, which, after setting out that he was qualified as an elector and voted at the election, stated that defendant was a candidate for the office of alderman, and being elected, took his seat in the City Council; that the defendant, in his declaration, made by him after his election, stated as his property qualification for the said office, "An estate of freehold, to wit, a foundry and premises and vacant land on Beverley-street, in St. John's ward;" that he had examined the last revised assessment rolls for the city for 1864, and found that the name of defendant, jointly with John Neil and James J. Dickey, appeared thereon as rated for the said iron foundry and premises on Beverley-street as freehold for $195, and that defendant is rated for a vacant lot on the same street as freehold for $67; and that these properties are the same as mentioned in defendant's declaration: he further stated that he was informed by S. Brough, Esq., that the defendant induced him (Brough) to make a proposition to defendant in writing, proposing terms on which he (Brough) would sell the vacant lot above mentioned—it being his (Brough's) property—to defendant, which Brough did, and that defendant never accepted the proposition, nor did he (Brough) ever convey the lot to defendant; that it appears by the last assessment roll for the city for 1864, this vacant lot had been originally rated to Brough, but his name was erased and the name of defendant inserted therein instead; that Brough told the relator, defendant had not paid him anything for the lot, and that he (relator) believes that defendant procured his name to be put on the assessment roll for the purpose of appearing as qualified for the office of alderman; that having searched the records of the registry office for the city, he verily believed that defendant has no legal estate in the land and premises described by defendant as a foundry, &c., in his said declaration; and that by the records in the registry office the property claimed by defendant is encumbered by mortgages to the amount of £700.

*Blake*, Q. C., showed cause, and filed several affidavits on the part of the defendants.

John Carr, clerk of the City Council, testified that on the 15th April last, he was the owner of a house on Denison avenue, in St. Patrick's ward; that on that day he leased the same for one year thereafter, quarterly, to defendant, and that defendant entered into occupation of the same as his tenant, and was assessed in the last revised assessment roll as tenant thereof at $100 rent, the lowest actual annual value of the premises; that the lease has ever since continued, and is still in full force and virtue. He further stated that as clerk of the Council he had the custody of the last revised assessment rolls of the city, and he testified to correct and exact transcripts of those portions of the rolls in which defendant appears as assessed in the ward of St. Patrick. By this transcript the defendant appears to be assessed as follows:

BEVERLEY STREET.

| *No.* | *Assessment.* | Annual value. |
|---|---|---|
| No. 538 | Nathaniel Dickey, John Neil, J. J. Dickey, As owners, foundry, &c. | $195 |
| 586 | Nat. Dickey, as owner, house | 84 |
| 587 | " " " | 72 |
| 849 | (Originally S. Brough) owner vacant lot | 67 |

Revised, and name of N. Dickey inserted.

DENISON AVENUE.

1069 Nathaniel Dickey, occupant ..... 100

He further stated that defendant appealed against the assessmens of $100 on the vacant lot; and having stated to the Court of Revision that he was the owner, his name was inserted, and he procured the assessment to be reduced to $67. He further swore that as city clerk, having the city books before him, and being familiar therewith, he prepared for defendant his declaration of qualification, and informed defendant that it was, as he believed it in fact to be, taken correctly and sufficiently from the assessment books; and he stated that he did not include the leasehold property, because he believed, as he still believes, that defendant's qualification in Beverley street was sufficient.

James J. Dickey, a brother and partner in business of the defendant, swore: that defendant and one John Neil and himself, for some years past, and at the present time, have been and are co-owners in fee of the land on which the foundry is erected, and assessed in the roll at $195; that the lands are subject to a mortgage to the Scottish Amicable Society for £500 sterling, principal money, and no arrears of interest. He stated that last June he and his partners were prepared to pay it off, and applied to do so, but that the company's agents refused, unless upon a six months' notice, and subsequently an agreement to extend the time for four years was made, giving additional security for the payment of the mortgage money upon certain shares in another society, worth in cost at present at least $2,150, and payable in 1868, with a high rate of interest, compounded half-yearly, and which in 1868 will amount to a sum much larger than the mortgage on the premises; which shares were to be transferred to the solicitor and agent of the mortgagee, and to Edward Blake, Esq., their solicitor, as trustees for both parties: and he further swore, that independent of that security, the mortgaged premises are worth $6,000, and that they would not accept any less sum therefor; that on the 1st May, 1864, Mr. Brough agreed with defendant for the sale to him of the second lot on Beverley-street, and that Brough signed and delivered to defendant an agreement for the sale, which agreement was verified and produced, and by it Mr. Brough agrees to sell the premises, letting them out to the defendant for £400, payable in ten years, with interest half-yearly, to be secured by mortgage on the lot; conveyance to defendant and mortgage back to be prepared and executed as soon as conveniently may be; defendant to pay the taxes for the then current year, 1864. Mr. J. Dickey further stated, that he was present at a conversation between defendant and Mr. Brough on the subject of the purchase; that there being some incumbrance on the lot, which

Mr. Brough was to pay off or have the time for payment extended, the defendant assuming the same, it was agreed that Mr. Brough should make arrangements in respect of the incumbrance, and the contract should then be completed by conveyance. In the meantime defendant should enter into possession, which he did, and has since continued in possession; and he stated that defendant is the owner in equity of the fee of the premises.

The defendant himself, in his own affidavit, stated, that J. J. Dickey was the person who managed the transactions with the Scottish Amicable Insurance Society, and he incorporated the several matters stated in J. J. Dickey's affidavit, and stated that they were true. And as to his declaration of qualification, he stated that he supposed and believed that it included the other properties mentioned in the affidavits; that as it was prepared by the clerk of the Council, he did not closely examine it, as the clerk knew the properties he was assessed for, and who informed him at the time that it included property more than sufficient for his qualification.

*McMab* for the relator.

MORRISON, J.—As to the first objection, after a careful examination of the affidavits filed on the part of the defendant, in connection with the fact that the last revised assessment roll shows that the defendant, besides being rated with his partners for the foundry premises, and as sole owner for the vacant lot, that he was also rated as sole owner for two other properties rated at the annual value of $156, and also a leasehold property to the value of $100, and holding the views I have expressed in the previous case of *Regina ex rel. Blakely* v. *Canavan*, respecting equitable estates and incumbrances, I am of opinon that defendant, at the time of his election, was duly qualified for the office of alderman.

The relator having suppressed the fact of the defendant being rated for the property valued at $156, and not negativing the defendant being possessed of them at the time of his election, I do not think it necessary to call on the defendant for further affidavits relating to those properties.

As to the second and third objections, they are directed specifically against the validity of the defendant's declaration of office, not against the validity of the election, or the defendant's qualification at the time of his election.

The authority for the issuing of the summons herein is founded upon the 128th section of the Municipal Act, which enacts, that if the relator shows, by affidavit to a judge, reasonable grounds for supposing that the election was not legal, or was not conducted according to law, or that the person declared elected thereat was not duly elected, the judge shall direct a writ of summons in the nature of a *quo warranto* to be issued to try the matter contested. The clause and the subsequent sections are all directed to the trial of the validity of the election and the due election of the relator or some other person. The declaration of office referred to in the relator's statement is required to be made by the 175th section, but I see nothing in the act declaring that if the person elected omits making such declaration, or makes a defective one, or that he is not seised or possessed of the estate therein mentioned, that his election shall be void, or that it should be held that he was not duly elected. The statute, on the other hand, provides, by the 183rd clause, that if the person duly elected does not make the declaration of office within twenty days after his election, he is subject to a penalty, and by the 15th clause of the Interpretation Act, the wilful and corrupt making of any false statement in any declaration required or authorized by any of the consolidated statutes of Upper Canada, shall be a misdemeanor, punishable as wilful and corrupt perjury.

But even if the objections were open to the relator, it is quite clear from the affidavit of the clerk of the City Council, that having the custody of the assessment rolls, he drew up the declaration for the defendant, and inserted in it, as he thought, sufficient property for the purpose, and that it was a mere omission on his part to insert the other property for which the defendant was rated as proprietor.

As to the merits of the whole case, the defendant has fully met the objections attempted to be set up by the relator.

I am of opinion, therefore, that the office of alderman for St. Patrick's ward, in the city of Toronto, should be allowed and adjudged to the defendant, and that he be dismissed and discharged from premises charged on him, and do receive his costs of defence.

Order accordingly.*

## GENERAL CORRESPONDENCE.

ST. CATHARINES, June 22nd, 1865.

*To the Editors of the Law Journal.*

GENTLEMEN,—As the point submitted in the following question is of great importance to many students, will you be kind enough to give your opinion of it, and oblige

ONE OF THEM.

Under subsec. 2, sec. 3, cap. 35, Con. Stat. U. C., is a student disqualified for admission who keeps (say) one Term after his articles have expired, although at the time of keeping the Term he is under a new agreement with his principal?

Is he also disqualified under the Rules of the Law Society?

[We do not understand what our correspondent means by "a new agreement with his principal." The Law Society have in more than one instance permitted clerks to go up for examination when their articles have expired in the Term in which they go up or *immediately after it;* but in no case when a Term has intervened.—EDS. L. J.]

* See *Regina ex rel. Grayson*, v. *Bell*, 1 L. J. U.C. N.S. 130.

## MONTHLY REPERTORY.

### COMMON LAW.

Probate. April 21.

Birks v. Birks.

*Probate of two testamentary papers — Mistake— Admissibility of parol evidence—Testamentary papers not inconsistent with such other—The first not revoked by the last.*

A testator, having erased a clause in his will after the execution, asked a friend to make a fresh copy of the will, omitting the erased clause. The copy was made: but the person who made it by mistake omitted several other clauses. The copy was duly executed, and the omissions were not discovered until after the testator's death, both wills having remained in his custody up to that time. The two wills were not inconsistent with each other, and the latter contained no express clause of revocation. Probate was granted of both documents upon parol evidence of the circumstances under which they were drawn up and executed, as together containing the deceased's last will and testament. (13 W. R. 638.

Q. B. April 27.

Reg. v. Windsor.

*Habeas corpus—Extradition treaty with America— 6 & 7 Vict c. 66—Forgery—Forgery by the law of the State of New York.*

The 6 & 7 Vict. c. 76, s. 1, which was passed to give effect to an extradition treaty between England and the United States, provides that, in pursuance of that treaty, any person charged with the crimes of "murder, &c., forgery committed within the jurisdiction of the United States," who shall be found within the territories of her Majesty, shall, upon requisition being made by the United States' authorities, be delivered up to their custody.

*Held*, that an offence, which had no common element with forgery by the law of England, but with respect to which the local Legislature of New York had enacted previously to the conclusion of the extradition treaty, that any person charged therewith should, after conviction thereof, be deemed guilty of forgery, was not within the purview of 6 & 7. Vict. c. 76, s. 1. (13 W. R. 655.)

EX. May 8.

Martin v. Gribble.

*Bankruptcy Act*, 1861, *s.* 192—*Composition deed —Inequality.*

A composition deed, by which the creditors are entitled to the composition only on signing, is bad. (13 W. R. 691.)

EX. May 10.

Whittaker v. Lowe.

*Bankruptcy Act*, 1861, *s.* 192—*Majority of creditors in number and value—Secured and unsecured creditors.*

In determining whether the requisite majority in value of the creditors have assented to a composition deed, the value of the securities held by them is not to be deducted from the debts of secured creditors. (13 W. R. 723.)

B. C. May 11.

Stanifoeth v. Richmond.

*Practice—Setting aside writ of summons serve abroad—Cause of action out of jurisdiction.*

If a defendant, served with a writ of summons abroad, appears, he will not be allowed to set aside the writ upon the ground that the cause of action declared on did not arise within the jurisdiction of the court, and it makes no difference that the writ was not specially indorsed. (13 W. R. 724.)

B. C. May 10.

Reg. v. The Trustees of the Hearts of Oak Benefit Society.

*Mandamus—Secretary of benefit society—Office of public nature.*

A rule nisi granted for a mandamus requiring the trustees of a friendly society, registered under the Joint Stock Companies' Act, to restore one, who had been secretary of the society, to his office. (13 W. R. 724.)

### CHANCERY.

V. C. R. May 3.

Oakden v. Pike.

*Vendor and purchaser—Condition of sale—Waiver —Delivery of abstract.*

An estate was sold by auction and a memorandum signed on the back of the particulars, one of the conditions being that the abstract shall be delivered and objections taken within a specified time, and if not so made, the title shall be considered so far, as accepted. The abstract was sent in, and certain requisitions made in time; but, subsequently, on the opinion of counsel, a doubt was raised on the construction of a will set out in the abstract, but without the residuary clause, to which the vendor's solicitor replied, that they were willing to execute a disentailing deed, &c., but that, of course, the conditions were not waived.

*Held*, that the delivery of the abstract was the sending of that document, and the setting out of the will sufficient; that the objection not being sent in time, and the condition not waived, the title must be considered as accepted, and the vendors were entitled to a decree. (13 W. R. 673.)

V. C. W. May 6.

Dilley v. Matthews.

*Will—Construction—Illegitimate children.*

Testator, after appointing "my wife, Sarah, guardian of my infant children," gave the income of his property "to my said wife," and after her death the principal to his children.

At the date of his will testator had a wife living, who had deserted him, but no legitimate children. He was living with a woman (Sarah N.), and had gone through the ceremony of mar-

riage with her; several children having been born during their cohabitation.

*Held*, that Sarah and her children were sufficiently indicated by the testator to enable them to take under the bequest contained in his will.

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L. J. April 18, 19, 26.

Lloyd v. The London, Chatham and Dover Railway Company.

*Injunction—Breach of covenant—Mistake—Acquiescence—Public policy.*

Where a breach of covenant is proposed, the court will not refuse to interfere on the ground that there has been a mistake on the part of both parties in the form of the covenants; or that the aggrieved party may have already permitted some other infringement of the covenant; or on the ground of inconvenience to the public (Knight Bruce, L. J., dissentiente).

Before the court would refuse to enforce a covenant, it must be clear that no substantial damage could arise from the breach of it. (13 W. R. 698.)

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V. C. K. May 8, 9.

Bell v. Wilson.

*Mines—Deed reserving mining rights—Construction—"Minerals"—Freestone.*

Where, in a conveyance of land in Northumberland, there is an exception of "all mines and seams of coal and other mines, metals and minerals" in favour of the vendor, freestone is not included in that exception. Although the word "minerals," in its most extensive sense, means all that composes the earth's crust, including the superfices, it is not so in the case of vendor and purchaser.

Every case of exception in a conveyance depends on its own circumstances, and the intention of the parties. (13 W. R. 708.)

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## REVIEWS.

New Manual of the Costs, Forms, and Rules in the Common Law Courts of Upper Canada. *By* A. G. McMillan, *of Osgoode Hall, Student-at-Law.* Toronto: Rollo & Adam, 1865.

We have already briefly noticed this work, and have since carefully examined it. We have no hesitation in saying that it supplies—and well supplies—a want long felt in the profession. It deals with a subject of much difficulty, and the labour of the author is by no means to be judged of by the number of pages he has written. Many would have despaired of success on such a subject; but he has persevered, and produced a work alike useful to the profession and creditable to himself. It should be a *vade mecum* to every practising lawyer and zealous law-student. Lazy lawyers and lazy law-students may not see much to admire in it; but a practitioner or student, really in earnest, will not be without it.

It is prefaced by short historical sketches of the Superior Courts of Common Law and the County Courts. Next follow some remarks on the recent Stamp Act (27 and 28 Vic. cap. 5.) Then we have an elaborate tariff of costs in the Superior and County Courts, alphabetically arranged according to the subjects in respect to which costs may be taxed. This we look upon as a most valuable repository of "useful knowledge," and one essential to the completeness of the work. The author, unmindful of labour, has appended to each page references to decided cases on the subjects appearing on the face of each page. Were there nothing more in the book to recommend it to the patronage of the profession, we should consider this repository more than value for the cost of the work.

It may not, perhaps, be out of place here, for fear of a mistake, to draw attention to note (*a*) on page 42, where it is stated that a judgment creditor will not be allowed the costs of a garnishing application, either against the judgment debtor or the garnishee, on the authority of *The Bank of Montreal* v. *Yarrington*, 3 U. C. L. J. 185. The late case of *Evans* v. *Evans*, 1 U. C. L. J. N. S. 19, 51, decided first by *Spragge*, V. C., in chambers, in accordance with the former case, but subsequently reversed on appeal to the full court, is an authority the other way,—his lordship then saying, that since giving his judgment in chambers he had conferred with one of the Common Law Judges, and had been informed that it was now the practice at law to grant the costs of a garnishing application when there was a sufficient fund out of which to pay them. Note (*s*), on page 56, with respect to sheriff's poundage, should also be supplemented by a reference to the late cases of *Winters* v. *The Kingston Permanent Building Society*, 1 U.C. L. J. N. S. 107; *Buchanan* v. *Frank*, Ib. 124; 15 U. C. C. P. 196, which decide that a sheriff is not entitled to poundage unless he *actually levies the money*, no matter whether the money is made by *pressure* of the writ or not. These cases, however, were probably not decided in time to be noted. We publish in another column an important case on the subject of taxation of costs (*Ham et ux.* v. *Lasher*), to which we also refer those interested.

Mr. McMillan also gives us some remarks on preparing and taxing bills of costs, accompanied with references to decided cases, which remarks we heartily recommend to every man who may be interested in a correct and complete bill of costs. It is no disgrace to be able to produce to the taxing-master a complete bill of costs. The disgrace is rather in presenting to him a slovenly one, containing many items which ought to have been omitted, and omitting some that ought to have been inserted. And this, according to our experience, is the rule at Osgoode Hall. The consequence is not only loss to the profession, but increased evil, and vexation to the taxing-officers of the courts. There is a science in the

preparation of a bill of costs which any man of average intelligence can learn, if he but take the trouble. The fact is, men do not study this as they do other branches of the profession. But even this should not be neglected,—"The labourer is worthy of his hire." The value of the services of the legal labourer is regulated by statutes and rules of court; if he is too ignorant or too lazy to make himself acquainted with the tariffs and their proper application, he entails npon himself a loss that could easily be avoided.

But, it may be said, what is the use of all this material if we do not know how to put it together? This want also has been anticipated by the author. He publishes forms of bills of costs under different circumstances, which, as guides, will be found of great service. There are no less than sixteen such forms, apparently carefully compiled. The use of them, after reading the first part of the work, will enable any student to prepare and to tax bills of costs, which will annoy no man—which will be a gain to his master and a pleasure to himself as well as to the taxing-officer.

The work would not be complete without the publication of the Stamp Act, which is given in full in the volume before us; and in order to make his book as widely useful as possible, the author has given us tables of fees in Division Courts, Equity side of the County Court, Surrogate Courts, and Registry Offices. He also publishes the schedule of fees allowed to Clerks of the Peace; then follow fees before the Heir and Devisee Commission, sheriffs' fees, fence-viewers' fees, and *quo warranto* costs. His remarks on conveyancing charges are deserving of attention. It is everywhere felt that this branch of the law demands a remedy, which it is hoped our legislature will ere long supply.

We next have nineteen forms of practical value, with an example of a country attorney's bill of a simple motion in chambers, made by a Toronto agent. Then follow new rules of Court as to costs, &c.; and the work closes with an alphabetical index, which, taken with the alphabetical repository in the first part of the work, makes the book not only full of useful knowledge but easy of access.

We congratulate Mr. McMillan on the completion of his unpretending but most useful book. The labour of the practitioner is much lightened by the publication of such a work. No practitioner or student should be without it. The gain in one day, in an office of ordinary practice, by the use of the work in the preparation of bills of costs, would more than pay the expense of a copy of the work.

We trust the return to Mr. McMillan, not merely in direct gains from the sale of the work, but in indirect advantages in being the author of a work so practical, on a subject so useful to the practical lawyer and law-student, will be such as to repay him for the labour bestowed upon it.

## CHANCERY AUTUMN CIRCUITS, 1865,

FOR THE EXAMINATION OF WITNESSES & HEARING OF CAUSES.

THE HON. THE CHANCELLOR.

| | | |
|---|---|---|
| Toronto..... | Tuesday..... | 29th August. |

EASTERN.

THE HON. THE CHANCELLOR.

| | | |
|---|---|---|
| Ottawa..... | Tuesday..... | 19th September. |
| Cornwall..... | Saturday..... | 23rd " |
| Brockville..... | Tuesday..... | 26th " |
| Kingston..... | Thursday..... | 28th " |
| Belleville..... | Monday..... | 2nd October. |
| Peterborough.. | Wednesday..... | 4th " |
| Lindsay..... | Monday..... | 9th " |

WESTERN.

THE HON. VICE-CHANCELLOR SPRAGGE.

| | | |
|---|---|---|
| Simcoe..... | Thursday..... | 12th October. |
| Goderich..... | Monday..... | 16th " |
| Woodstock..... | Friday..... | 20th " |
| London..... | Tuesday..... | 24th " |
| Chatham..... | Monday..... | 30th " |
| Sandwich..... | Thursday..... | 2nd November. |
| Sarnia..... | Monday..... | 6th " |

HOME.

THE HON. VICE-CHANCELLOR MOWAT.

| | | |
|---|---|---|
| Niagara..... | Thursday..... | 26th October. |
| Hamilton..... | Monday..... | 30th " |
| Brantford..... | Monday..... | 6th November. |
| Guelph..... | Thursday..... | 9th " |
| Barrie..... | Tuesday..... | 14th " |
| Cobourg..... | Monday..... | 20th " |
| Whitby..... | Friday..... | 24th " |

By the Court.

A. GRANT, Registrar.

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| D. McMillan | Cornwall. |
| Telesphore Lemay | Three Rivers. |
| Wm. J. Taylor | Tp. Albion. |
| George Hinman | Stratford. |

## APPOINTMENTS TO OFFICE.

### NOTARIES PUBLIC.

WILLIAM HENRY RICHEY ALLISON, of Picton, Esq., Barrister-at-Law, to be a Notary Public in Upper Canada. (Gazetted June 17, 1865.)

JOHN McINTYRE, of Kingston, Esquire, Barrister-at-Law, to be a Notary Public in Upper Canada. (Gazetted June 17, 1865.)

GEORGE DEAN DICKSON, of Belleville, Esquire, Barrister-at-Law, to be a Notary Public in Upper Canada. (Gazetted June 17, 1865.)

### REGISTRARS.

JOHN HIGGINSON, Esquire, to be Registrar of the County of Prescott. (Gazetted June 17, 1865.)

## TO CORRESPONDENTS.

"A Member of the Profession." We think that a clerk of a county court is entitled to fee for taxation. As to the fee for computation, we are not so certain. We do not understand, from your query, whether there is any computation *in fact*

"One of them"—Under "General Correspondence."

## DIARY FOR AUGUST.

1. Tues ... *Lammas.*
6. SUN ... *8th Sunday after Trinity.*
10. Thurs. *St. Lawrence.*
12. Sat .... Articles, &c, to be left with Sec. Law Society.
13. SUN ... *9th Sunday after Trinity.*
16. Wed. .. Last day for service for County Court.
20. SUN... *10th Sunday after Trinity.*
21. Mon ... Long Vacation ends.
24. Thurs. *St. Bartholomew.*
26. Sat .... Declare for County Court.
27. SUN ... *11th Sunday after Trinity.*
28. Mon ... Trinity Term begins.

## NOTICE.

*Owing to the very large demand for the* Law Journal *and* Local Courts' Gazette, *subscribers not desiring to take both publications are particularly requested at once to return the back numbers of that one for which they do not wish to subscribe.*

THE

# Upper Canada Law Journal.

AUGUST, 1865.

## THE LORD CHANCELLOR OF ENGLAND.

The events that sullied and at the same time added lustre to the pages of English history some two hundred and forty odd years ago, appear to have been in some measure re-enacted in England during the past few months. The keeper of the King's conscience, holding precedence over all temporal lords, the disposer of vast patronage and above all presiding over the very fountain of equity and good conscience, has been tainted with, to say the least of it, the suspicion of improper conduct, and this very suspicion of one, who, like Cæsar's wife, should be "above suspicion," has led to what cannot be considered to be otherwise than the fall and temporary disgrace at least of a most brilliant man and able lawyer.

For hundreds of years, it might almost be said from the commencement of English history, the judiciary of England has been free from the taint of corruption. The case of Lord Bacon seems to stand alone as an example to the contrary. Men of his day stood aghast not only at the enormity of his fault, both in itself and its consequences, but at the sight of the most subtle intellect that probably was ever made, "the high priest of nature," "the wisest, brightest," but as he proved himself to be "the meanest of mankind," condescending to acts which the lowest officer of his court would despise. Englishmen of the present day look with shame at the reproach which has lately been cast upon the nation at large and upon the almost spotless integrity of English statesmen in particular.

The first charge against Lord Westbury, the late Chancellor, was in reference to what has been termed the "Edmunds' scandal." A Mr. Edmunds, who had for seventeen years served the House of Lords as reading clerk and clerk of the private committees was also connected pecuniarily with the patent office. There were certain defalcations and irregularities in his connection with that office, owing partly, as he rather coolly complained, to the want of a public audit. These defalcations and irregularities were known to, but perhaps not remediable by the Chancellor. Mr. Edmunds resigned his appointment and presented a petition to the House for a retiring pension, which was recommended to be paid to him by the report of a committee, not aware of the facts known to the Chancellor, except from some rumours which were considered too vague to be noticed. It is alleged that at the time this resignation was on the *tapis* a promise was made by the Chancellor "that if Mr. Edmunds would resign he would throw no obstacle in the way of his pension." Whether these were his exact words is not certain, but they were doubtless to that effect. The gravamen of the charge was that the Chancellor, well knowing of these defalcations and irregularities on the part of Mr. Edmunds, but not disclosing his knowledge, had recommended, or at all events not opposed the retiring pension, with the supposed intention of filling the vacant office with one of his sons. A select committee was appointed to enquire into the matter. This committee acquitted the Chancellor of any unworthy motives, but thought he had committed a grave error in judgment and taken a wrong view of his duty. Of this there can be no doubt, but a solicitor of first rate standing in London has gone further than this, and whilst hinting at unworthy motives, directly charges the Chancellor with an untruth, apparent on the face of his own letters and statements. This is another unpleasant feature in the case which has not yet, that we are aware of, been explained or contradicted.

Following closely upon these transactions comes the question of Lord Westbury's connection with the Leeds Bankruptcy Court. It

was asserted that a Mr. Wilde, when registrar of this court, was called upon to resign his office, owing to some irregularities therein, but that he refused to do so; upon which he was first of all threatened, and then informed that if he would resign at once and obtain a medical certificate, he should have a pension of £600 a year, although he was then in a good state of health. This he was induced to do, and the Chancellor signed an order for the pension. A Mr. Welch, said to be in a precarious state of health, succeeded Mr. Wilde, and appears to have paid for the office, to Mr. Richard Bethell, the Chancellor's son, one thousand pounds. It was further alleged, that it was agreed between these men that Mr. Welch should hold the office until the reversal of the outlawry of Richard Bethell, and then receive another appointment in London, which city he preferred to Leeds. The most damaging feature of the case was, that Mr. Miller, the chief registrar of the Court of Bankruptcy, a friend of the family, had prepared appointments to these two offices,—for Mr. Bethell at Leeds and Mr. Welch at London; and it added to the suspicions, that such a practice in filling up these appointments had never before prevailed. The documents, however, never were signed, as the Lord Chancellor, hearing of some misconduct of his son in in Paris, or perhaps alarmed at the strong feeling which was evinced by the public with reference to the disclosures made in the "Edmunds case," which was increased by the indiscreet conduct of Richard Bethell, in stating at Leeds that he had received the appointment, absolutely refused to do so.

The Chancellor of course denied any knowledge of any bargain which might possibly have been made by Mr. Richard Bethell, (a disreputable character enough apparently,) with Mr. Wilde or Mr. Welch; but the desire for investigation was so strong that the government were obliged to acquiesce in a motion for a committee of enquiry, which was appointed, and subsequently brought in a report acquitting Lord Westbury from all charge in the matter except that of haste and want of caution in granting a pension to Mr. Wilde.

The public, however, were not satisfied, and the matter was again brought up on a motion of Mr. Hunt, which, with a condensed report of the discussion upon it, we copy from the public prints:—

"That the evidence taken before the committee of this House on the Leeds Bankruptcy Court discloses that a great facility exists for obtaining public appointments by corrupt means; that such evidence, also that taken before a committee of the House of Lords in the case of Leonard Edmunds and laid before this House, shows a laxity of practice and want of caution on the part of the Lord Chancellor in sanctioning the grant of retiring pensions in public officers over whose heads grave charges are impending, and in filling up the vacancies made by the retirement of such officers, whereby great encouragement has been to corrupt practices; and that such laxity and want of caution, even in the absence of any improper motive, are, in the opinion of this House, highly reprehensible, and calculated to throw discredit on the administration of the high officers of state."

The Lord Advocate contended that there was nothing in the case to warrant the severe censures which had been passed upon the Lord Chancellor, and moved an amendment to the effect that the House agreed with the report of the committee, but thought that a check should be put by law on the granting of pensions to persons holding legal offices.

Mr. Hennessey contended that this did not touch the Edmunds' case, which was embraced in Mr. Hunt's motion. Mr. Bouverie had given notice of an amendment, which he could not now move. If, however, the original motion were negatived, he should move his amendment on that of the Lord Advocate. He had no confidence in the Lord Chancellor.

Mr. Hunt offered to substitute for his own motion the amendment of Mr. Bouverie, which was as follows:—

"This House, having considered the report of the committee on the Leeds Bankruptcy Court are of opinion that, while the evidence discloses the existence of corrupt practices with reference to the appointment of Patrick Robert Welch to the office of Registrar of the Leeds Bankruptcy Court, they are satisfied that no imputation can be fairly made against the Lord Chancellor with regard to that appointment; and that such evidence, and also that taken before a committee of the Lords to enquire into the circumstances connected with the resignation by Mr. Edmunds of the offices held by him, and laid before this House, show a laxity of practice and a want of caution with regard to the public interest on the part of the Lord Chancellor, in sanctioning the grant of retiring pensions to public officers against whom grave charges were pending, which, in the opinion of this House, are calculated to discredit the administration of his great office."

Lord Palmerston, observing that the House had negatived any charge of corruption against the Lord Chancellor, recommended and moved that the debate be adjourned till Tuesday.

Mr. Disraeli opposed this motion, which was negatived, upon a division, by 177 to 163.

The Lord Advocate's motion having been negatived—

Mr. Bouverie moved his amendment as a substantive motion, which was agreed to without a division.

It was well understood that Lord Palmerston's motion was for the purpose of gaining time and giving the Chancellor an opportunity to resign, it was therefore accepted as a test, and voted upon accordingly.

The result of the debate was therefore that a very strong vote of censure was passed upon the Chancellor, in consequence of which he immediately sent in his resignation, which was at once accepted, and Lord Cranworth, better known as Baron Rolfe, has since been appointed to the vacant seat on the woolsack.

In his farewell address to the House of Lords, the Lord Chancellor spoke with much moderation and good feeling. After saying that it had been his desire to resign the seals of office many months before, he said—

"My lords, I believe that the holder of the Great Seal ought never to be in the position of an accused person, and such, unfortunately, being the case, for my own part I felt it due to the great office that I hold that I should retire from it and meet any accusation in the character of a private person. But my noble friend at the head of the Government combated that view, and, I think, with great justice. He said it would not do to admit this as a rule of political conduct, for the consequence would be that whoever brought up an accusation would at once succeed in driving the Lord Chancellor from office."

He then stated th t he had since, on three several occasions, desired to resign, but was again urgently requested not to do so. He then continued—

"I have made this statement, my lords, simply in the hope that you will believe and that the public will believe that I have not clung to office, much less that I have been influenced by any baser or more unworthy motive. With regard to the opinion which the House of Commons has pronounced I do not presume to say a word. I am bound to accept the decision. I may, however, express the hope that after an interval of time calmer thoughts will prevail, and a more favorable view be taken of my conduct. I am thankful for the opportunity which my tenure of office has afforded me to propose and pass measures which have received your lordships' approbation, and which I believe, nay, I will venture from experience to predict, will be productive of great benefit to the country. With these measures I hope my name will be associated. I regret deeply that a great measure which I had at heart —I refer to the formation of a digest of the whole law—I have been unable to inaugurate; for it was not until this session that the means were afforded by Parliament for that purpose. That great scheme, my lords, I bequeath already prepared to the hands of my successor. As to the future, I can only venture to promise that it will be my anxious endeavour, in the character of a private member of your lordships' House, to promote and assist in the accomplishment of all those reforms and improvements in the administration of justice which I feel yet remain to be carried out. I may add, in reference to the appellate of your lordships' House, that I am happy to say it is left in a state which will I think be found to be satisfactory. There will not be at the close of the session a single judgment in arrear, save one in which the arguments, after occupying several days, were brought to a conclusion only the day before yesterday. In the Court of Chancery I am glad to be able to inform your lordships I do not think there will remain at the end of this week one appeal unheard or one judgment undelivered. I mention these things simply to show that it has been my earnest desire from the moment I assumed the seals of office to devote all the energies I possessed and all the industry of which I was capable to the public service. My lords, it only remains for me to thank you, which I do most sincerely, for the kindness which I have uniformly received at your hands. It is very possible that by some word inadvertently used—some abruptness of manner—I may have given pain or exposed myself to your unfavorable opinion. If that be so, I beg of you to accept the sincere expression of my regret, while I indulge in the hope that the circumstance may be erased from your memories. I have no more to say, my lords, except to thank you for the kindness with which you have listened to these observations. (Loud cheers.)

As to the merits of the case it must be remembered that there is no proof of guilty knowledge on the part of Lord Westbury, and there appears to be a growing impression that many of the suspicious circumstances which have been so much dwelt upon, are capable of explanation, and do not fairly bear the construction that have been put upon them. It

is well known that he has had a host of enemies, some envious of his talents and success, others made so by the gigantic reforms which he has successfully carried out in the Ecclesiastical, Probate, and Divorce Courts, and particularly in reforming the abuses of the Bankruptcy laws. He is cursed, moreover, with about as bad a son as ever fell to the lot of an unfortunate father, and it is no amelioration of his sorrows that this reckless unprincipled scapegrace is almost wholly the author of his father's misfortunes.

He is, moreover, a man that is personally unpopular, a man of stern and unyielding exterior; but as it appears of too little strength of mind, or too careless to resist persistent appeals to his organ of benevolence. He also trusted too much, like nearly all public men, to the representations of those who were in positions of confidence about him, and whose duty it was to guard him from the devices of hungry applicants for office.

We are aware that these excuses, as applied to a man of the well known character and disposition of Sir Richard Bethell, are scoffed at by certain of the press in England, who, in the slashing manner so taking to the general reader, but so often devoid of sound thought, write in this way:—

"From what the world knows of the Chancellor, either at the Chancery bar or on the woolsack it hardly suspects his placability, his easy temper so capable of being imposed upon, his softness of heart and excessive amiability, his liability to disregard caution, his readiness to be made a tool of by the designing and corrupt, his constitutional incapacity to detect, or even to suspect, jobs, intrigue, and double-dealing. The world has taken the Chancellor to be possessed of the keenest of tempers, the hardest of heads, and the most searching of judgments; and it has thought that his success in his calling is to be attributed to these gifts of character. * * * If, as we are told, he is so good and guileless as to become so frequently (twice in a twelvemonth) the unsuspecting victim of the designing and the corrupt, then, to speak coarsely, we want somebody with more devil in him—less pliable, more suspicious, less gentle, less easy to be got over and got round, and taken in by vulgar rogues, less 'hasty,' and more 'cautious.' We want somebody more suspicious of human nature, with 'motives' equally unassailable and conduct less 'calculated to excite the gravest suspicions.' We want some one whom we can understand, whose character can be brought under common types, and can be judged by an ordinary standard. We can understand the man of oil, and we can understand the man of vinegar, and we can in his way respect either; but the oil-and-vinegar man puzzles cammon folks—the man who keeps all his oil for his own family purposes and his own apparent interest, and all his vinegar for the public. In anybody but Lord Westbury, we should be tempted to say that either his private virtues were a sham, or his public character for sharpness an imposture. This the two select committees declined to believe; they can understand and appreciate Lord Westbury. It is, of course, the world's fault, or it may be the world's misfortune, if it fails to estimate this complex and certainly rare ideal."*

But, strange as it may seem to the writer of that article, more curious compounds of human nature have existed than have appeared in Lord Westbury. It cannot be denied, moreover, that political influence had something to do with the vote on the question. The party opposed to the Government took advantage of the strong feeling which had, rightly or wrongly, been raised against the Lord Chancellor, or rather against the system of nepotism which has been lately brought to light. But it does not follow that because this corrupt system has been brought before the public during the official career of the late Lord Chancellor, that he is to be held personally responsible for all the evils of that system. Is he not in fact the first victim of the improved tone of public feeling with reference to that system? Is there not much truth in the assertion made in another periodical,† that

"The House of Commons affirmed the vote of censure because the country is tired of seeing all the best Church livings in the hands of the sons and sons-in-law of bishops; every snug mastership filled by the son or nephew of a chief justice; every well-paid and non-responsible office of every kind in the possession of the family or friends of the patron?"

Whilst however heartily hoping that time will prove that he was more "sinned against than sinning," it cannot be denied that the course which the House thought fit to take in the premises, is strong evidence of the wholesome view taken of the subject by public men in England.

The loss to the country of such a man at such a time, is incalculable. He was in the

* *Saturday Review* July 1, 1865.

† 9 *Solicitor's Journal*, p. 793.

midst of plans for various reforms that had for years baffled the resources of less able men. He is said not to have his equal in Great Britain in forensic or legal ability, and is in the meridian of his vigorous intellect. But neither his intellectual superiority nor the high office which he held, could avail to give him that firmness of character, which should have rendered him deaf to any voice but that of duty and the public welfare—regardless alike of fear, favour, or affection—above the weaknesses of misplaced confidence—vigilant and acute in detecting frauds upon the public, and superior to allurements of a vicious system, which it would have been his glory to overthrow.

All these minor points of this melancholy subject, will however soon be forgotten, and it behoves us now to turn as well to the bright side of the picture, a view not we think brought as prominently forward as it deserves. History tells us that when Lord Bacon stood self-convicted of great crimes, the nation as one man demanded that he should be punished according to his deserts, without reference to his exalted rank and the fame of his marvellous intellect. He was sentenced to a fine of forty thousand pounds (an immense sum in those days), to be imprisoned in the tower during the king's pleasure, to be incapable of holding any public office, and of sitting in Parliament or coming within the verge of the Court. The same hatred to corruption in high places that effected this, and has made Great Britain conspicuous among the nations of the world, and which has been as it were the salt that kept her pure, still remains. It is a thing to be proud of that even the *suspicion* of impropriety is sufficient to drive from his position the highest and most favoured servant of the Crown, backed up by the prestige of his services and his abilities, and all the influence of the Government.

Thus for the second time has England purged herself from the stain that lay upon her, and that to the ruin of a man worthy, we think, of a better fate. Few countries, if any, can make the same truthful boast. Let it be our endeavour to follow in her footsteps.

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## INSOLVENCY—CONFLICTING ASSIGNEES.

A much debated point has just been decided in the Court of Chancery under this act, with reference to the respective force and validity of a voluntary assignment made since the act, but not under its provisions, and proceedings under the act for compulsory liquidation.

Sec. 3, 1 (*i*) of the act provides that a debtor shall be deemed insolvent, and his estate subject to compulsory liquidation, if, amongst other things, he has made any general conveyance or assignment of his property for the benefit of his creditors, otherwise than in the manner prescribed by the act. This provision was generally considered (and it was so held in *Hogge's* case by the learned judge of the County Corrt of York and Peel) not to apply to assignments made previous to the time the Insolvent Act came into force, and which were valid, under the law as it then stood, as general assignments for the benefit of creditors; from which it would follow that assignees appointed under them are still liable and compellable to wind up and distribute the estates entrusted to their care. It would also seem to follow that if an assignment made before the act were bad in point of law as against creditors, it could not prevail against subsequent proceedings under the Insolvent Act; and in discussing this it would be material to consider whether the assignee under the act would have a *locus standi* to contest it, there being no special provision in the act which would make him stand in the stead of the creditors generally.

If making an assignment contrary to the provisions of the act is an act of insolvency, it would seem to follow as a natural consequence that such an assignment could not be permitted to stand in the way of proceedings taken under and in accordance with the act, unless indeed three months should elapse from the time of committing this act of insolvency before the commencement of such proceedings: (Sec. 3, subsec. 5.)

His Lordship Vice-Chancellor Mowat, in giving judgment in *Willson* v. *Cramp*, the case in which the point came up,* considered that any construction of the act which would prevent an assignee appointed under the act from receiving and administering the property of the insolvent, would render futile the enact-

* Reported in full on page 217.

ment which makes such an assignment an act of insolvency, and would deprive the creditors of the advantages which the statute gives them for the winding up of the estate of an insolvent debtor. His Lordship also thought that it would be objectionable to let the assignment stand, as it put the debtor's property under a different course of distribution amongst his creditors from that which is contemplated and provided by the act—as, for example, in not giving any priority to the claims of clerks and other servants of the insolvent.

The scope of section 8, with reference to impeding and delaying the creditors of the insolvent, was also referred to as in itself sufficient to warrant the decision of the Vice-Chancellor, that such an assignment as that referred to was of no avail against subsequent proceedings under the act, and on this point he cited cases in England under analagous statutes there.

The law on this point having now been judicially determined, it will be necessary for all assignees of voluntary assignments since the act, but not under it, to govern themselves accordingly; and should any such refuse to comply with a proper request to deliver up the books and property of the estate, they would become personally responsible for the costs of any suit that might be brought against them to compel them to do so.

## NEW EDITION OF HARRISON'S COMMON LAW PROCEDURE ACT.

Our readers will be glad to learn that Mr. Harrison is now engaged in preparing for the press a new edition of his "Common Law Procedure Act," and other Acts connected with the civil administration of justice, as appearing in the Consolidated Statutes of Upper Canada, including notes of decided cases, English and Canadian, up to the time of the work going to press. The value of this work is so well known to the profession, as to need no commendation from us. The first edition drew from the *London Jurist* and other leading periodicals in the Old World, most favorable criticisms, and has (though a large edition) been completely exhausted. It is, we understand, Mr. Harrison's intention to place the work in the hands of the printer during the present month, and to have it published with the least possible delay.

# SELECTIONS.

## THE ORIGIN OF MAGNA CHARTA.

It is one of the curious phenomena of history, that in an age of feudal barbarism and debasement, one of the most unprincipled, false, and cowardly of all the English kings, should have promulgated, in a systematic form, a declaration of personal rights to his subjects, which is regarded with so much reverence in the light and liberty of the nineteenth century. And it is equally a matter of surprise that a body of rough, unlettered barons, surrounded by bodies of slaves, to whose minds personal freedom was as strange as the luxuries of modern civilization, engaged in incessant broils and petty wars with each other, and with the crown, who knew little law beyond the might of the strongest, and the only restraint upon whose morals was a slavish fear of the church, should have come together and have deliberately dictated or accepted a declaration which affected not merely their own privileges and immunities, but those of the future citizens of a constitutional monarchy, having its essential foundation in the then powerless and unheeded commonalty of England.

The Chronicles of England furnish us the fact that an instrument bearing date on Trinity Monday, June 15th, 1215, was executed by King John, and that that instrument was called *the Charter;* but it requires us to go back anterior to that date, if we would learn the causes which led to such a step, or the sources from which its provisions were derived, as well as to study the condition of the people of England at the time it was granted.

The English common law, which forms, also, a principal element of our own, is a piece of Mosaic, in which the Saxon laws and institutions form an essential constituent. It is very remarkable that after four hundred years' occupancy of the island, the Romans left so few traces of their laws and costumes. And though the Danes, during the twenty-four years while they occupied the kingdom, introduced many of their laws, some of which found their way into the English law, its substratum was, after all, deeply and permanently laid in the laws, sentiments, habits and opinions of the Saxon race, who held the kingdom for six hundred years prior to the Norman Conquest.

In a period and among a people when commerce, beyond that of the freebooters of the sea, was unknown, and almost the only property recognized was lands and implements of husbandry, with the beasts of the field, and the slaves attached to the soil, and whose only business of life, moreover, was war or agriculture, we should look in vain for the varied rules and systems of law to which modern commerce and civilization have given rise. And it is a matter of surprise now, that no one can tell, at this day, how far the feudal system had obtained a foothold among the Saxons before the Norman Conquest. But in

some things there were characteristic rules recognized by the Saxon law which were justly held in high favor; lands were freely alienable, and might be devised by the owners by last will. Justice was cheaply and conveniently administered, and a pervading, though perhaps not well defined sense of personal right and freedom was diffused among the people, which answered to the more modern and refined notions of *civil liberty*. There was, moreover, an instinctive love of their own local laws and institutions, to which they clung under every reverse, and returned to, as soon as the adverse circumstances which had suspended the enjoyment of these had been overcome. The moment the Danes were expelled, the natives resumed their former laws, while they retained some of the Danish customs which had been found congenial to the national taste. This respect for their laws must, of course, have been chiefly traditional, since the capacity of reading and writing was too rare to be regarded as a national trait. One of the most popular acts on the part of the great and wise Alfred was the framing out of these a code which, from that day, has been regarded by the English with veneration, with the exception of the period while the Danes held the power, and after the arrival of the Normans, till they became amalgamated into the nationality of England. The work begun, but left unfinished by Alfred, was completed by Edward the Confessor, in the body of laws which he compiled, and to which the Saxons were in the habit of recurring on all occasions, after the introduction of the feudal law of Normandy, in contrast with the slavish and oppressive institutions which their conquerors had imposed upon them, till a respect for these ancient laws became a prevailing sentiment in the kingdom; and on more than one occasion the reigning monarch sought to win the favor of the people, by recognizing these as a part of the laws of England.

The feudal system came in, in full force and vigor, with the Conquest; it nowhere prevailed in a more absolute form than in Normandy, and was enforced with the greatest rigor by William and his followers, who took the name of *barons*, the Norman term which was applied to those who were his *men*. He seized upon the lands of Harold and his followers, under the pretence that they were subjects of confiscation for their treason towards him. He sought out all the *Land-Bocs* or records of titles on which he could lay his hands, and caused them to be destroyed, and, by forcing the leading Saxon land-holders into insurrection and rebellion, by his outrages and oppressions, he made it a pretence for seizing upon their lands, and in these ways converted most of the kingdom, with the exception of Kent, and some other smaller portions of it, into a state of feudal subordination and dependence upon himself, as the Lord Paramount of the realm. These lands he granted out, in return, to his cheif barons, giving to some more, and others fewer manors in number, according to his favor or caprice, requiring from them the services which a feudal vassal owed to his lord; and they, in turn, divided these lands to their own vassals, from whom they exacted a similar return in services.

The whole system of feuds was one of arbitrary and irresponsible despotism. The State, as a body politic, with its State laws, and its general system of protection for the many against the arbitrary power of the few, was all but ignored. Instead of this, the kingdom was divided into a multitude of little baronies, each with its own court, and its own system of justice, without any appeal, in ordinary cases, from the domination of some petty lord to any immediate superior, for protection or relief. While it left the mass of the people in a state of villanage, which was another name for slavery, the freeholders of the land were themselves subordinate to an immediate or remote superior, to whom they owed fealty and homage. Add to this, the hatred and jealousy with which the Saxons regarded their feudal masters, and the contempt and apprehension which the Normans entertained towards the Saxons, and we are not at a loss for the causes of those incessant outbreaks, insurrections, and domestic wars which fill up the chapters of English history for so long a period after the Norman Conquest. The Saxons were not strong enough to control the policy or laws of the kingdom, and yet they were strong enough to make themselves of sufficient consequence in any of these outbreaks, to be taken into account in measuring the power of any faction or party. There was a steady persistency on their part, in insisting that the laws of Edward should be restored; and so strong were they felt to be, that in the fourth year of William's reign, he solemnly swore to grant this request. But the enormous burdens of feudal tenures still continued; and the simple forms of Saxon judicature gave place to the Aula Regis, with the despotic powers of a Chief Justiciary, imported from Normandy, with Norman notions of law and justice. The lands of the kingdom were declared inalienable, except by the assent of the superior lord, and upon paying him therefor a heavy sum under the name of a *fine*, they could not be devised by last will, and upon the death of the owner his estate descended to his eldest son, by the law of primogeniture, which had come in with the Normans; and, all over the kingdom, the people were reminded of the presence of their masters, every night, by the tolling of the *curfew* bell, whose very name "*couver-feu*," was borrowed from the Normans, at which every fire and light were to be extinguished. William, and his son Rufus, were able to keep down the restless spirit to which those causes of irritation gave rise, by the force which they had at their command, and Henry I., by marrying a descendant from the Saxon line of kings, did much to allay the jealousy of the races. No

material change took place in the three succeeding reigns, except a gradual assimilation of Norman and Saxon, which would naturally arise from being natives of the same localities, and from occasional inter-marriages, and from the habit of traditional reverence which grew up, in time, for the ancient liberties and institutions of the Saxon period. John, as successor to these kings, came to the throne in 1199. Mean, treacherous and cowardly to the last degree, his reign was one continued struggle between himself and his subjects; on his part to deceive, oppress and tyrannize over them, and on their part to interpose a barrier against his abuse of power, and disregard of law. In 1213 he was absolved from the excommunication under which he had laid, by Archbishop Langton, and then made solemn oath that he would restore the laws of Edward. In the August of the same year, there was a meeting of the prelates and nobility of the kingdom at St. Paul's, when the archbishop informed them that he had discovered a charter granted by Henry I., under which they could re-establish their ancient liberties. The barons heard this with delight, and bound themselves, before the archbishop, by oath, to contend for these liberties, even to death itself, whenever opportunity presented. At a meeting of the earls and barons held at St. Edmundsbury, twelve months afterwards, this charter was produced, and they renewed their oath, at the high altar, to make war upon the king, if he refused to grant the liberties therein contained. They accordingly demanded a confirmation of that charter. The king asked a respite in which to decide, and also desired to be informed what the liberties were which they required him to grant. Whereupon they sent him a schedule consisting partly of what were found in Henry's charter, and partly of the laws of Edward.

This traditional account of the incipient steps towards obtaining the great charter, we are informed by Blackstone, comes from Matthew Paris, but has been adopted as true by modern historians.—(2 *Black. Trut.* vii..)

One thing is true, there was a charter granted by Henry I. which embraced many of the articles which afterwards found a place in Magna Charta, and the reverence for the laws of Edward was an ever active principle in the minds of the English people, who associated these laws with a state of freedom, in marked contrast with the feudal bondage in which they were then held; although it is not so easy to perceive why the barons should favor opinions more or less directly hostile to their own power, unless it was a means of enlisting the public favor upon their side, in the struggle which they were carrying on with the crown.

Blackstone, indeed, doubts the fact that this charter of Henry I. had been thus forgotten, and considers it more probable that its having been granted was rather a hint to the barons to require a charter from John, than that it furnished the materials for the charter which he did grant. But all historians agree in this, and it is the only point I wish to establish here, that the great charter of John was, for the most part, *compiled* from the ancient customs of the realm, or the laws of King Edward the Confessor, by which they mean the old common law, which was established under the Saxons, and before the feudal law had been introduced.—(2 *Bl. Tr.* xii.; *Co. Lit.* 81 a.) And I may add, what is known to every one familiar with the history of the common law, there has been in every stage of its progress an element of personal freedom, guaranteeing personal rights, and the security of person and prorerty, which no other code could ever pretend to. The civil or Roman law was the emanation of imperial power, the canon, the dogmas of a self-constituted hiearchy; while the common law partook of the character of the sturdy, self-reliant men who sprung up in England after the overthrow of the Roman power, and were never wholly subdued till their influence culminated in the Puritanism of the Commonwealth, and the national emancipation from the tyranny of the Stuarts at the revolution of '88. The charter of John, then, was not a deliberate and voluntary grant from a king of liberties and privileges to a confiding or even a suffering people. Nor, on the other hand, was it an original statement or declaration of a body of wise statesmen, profound thinkers, or learned and sagacious lawyers or politicians. What he yielded was done from fear, with a bad grace, a treacherous spirit, and in a cowardly manner; while the thing that he granted was a singular medley of personal and selfish purposes of the military leaders who dictated it, and of rights and privileges which the people, with whom they had little sympathy, had long regarded as something worth making any sacrifice to regain.

When, how, and where this charter was obtained, may be briefly stated, for in this history seems to be clear.

On the 20th Nov., 1214, the barons met at St. Edmunsbury and formed a league, swearing upon the high altar to wage war upon the king, and withdraw themselves from his fealty, till he should *confirm* by charter, under seal, the several liberties which they demanded. They accordingly came to London and made this demand. John at last agreed to answer by Easter. He immediately went to work to enlist the church on his side, and both parties appealed to the Pope. John moreover took him upon the cross, and vowed to undertake an expedition against the infidels in the Holy Land. But he accomplished little by this hollow-hearted appeal to the superstition of his subjects, inasmuch as Archbishop Langton was at the head of the confederacy against him.

The Pope favored the king's appeal to him, and wrote a letter to the barons and bishops, disapproving of any attempt to extort favors by force from the king; but, fortunately, this letter did not reach England till after the time at which John was to make his answer to the

baron's demands. Preparatory to this, the barons assembled with some two thousand knights of their retainer in their train, and marched to Brackely, about fifteen miles from Oxford, where the king was. This was on the 27th April, 1215. The king thereupon sent to them to ascertain precisely what liberties they claimed, and they sent him back a schedule, with a threat that if he did not grant them they would seize his castles; and they referred again to the character of Henry I. The king was greatly indignant at the demand, and replied to them by an oath that he never would grant their demands, and the barons thereupon took measures to enforce them. In May they disclaimed their allegiance to John, and obtained absolution therefrom by the favor of one of the canons of Durham; and, in the end, took possession of London on the 24th of that month. The king found himself abandoned by his followers, and all his lords but seven, and concluded to yield to the requirements of the barons, and proposed a meeting for that purpose. The 9th June was fixed for the meeting, but they did not come together till the 15th. The conference then opened, and was continued till the 19th, when the heads of the agreement, to which the king consented to acede, were reduced to the form of a charter, and sealed with his great seal. Original duplicates of this were prepared and deposited in every diocese in the kingdom, several of which are still extant, and two of them are now in the British Museum.

This, in brief, is the history of this famous instrument, which has from that day been regarded as the *great charter* of English liberties, and held in the highest veneration by every Englishman, wherever he was to be found. The English colonists brought with them this sentiment in all its freshness and vitality; and, through the long struggle with the mother country, constantly referred to it as the great palladium of their rights as Englshmen. It enters largely into the declaration of their rights in the constitution of Massachusetts and other of the States, and furnished the elements of thought, if not the forms of expression, which sprung up in so many shapes in the earlier declarations of American liberties.

Its effect in England was important and immediate in one respect, which is noticed by Mr. Macaulay in his history. It united and merged the hitherto discordant elements of Saxon and Norman races into one nationalty. A common suffering under the tyranny of a king who had proved himself false to all his subjects united them into a common struggle for redress; and the constant vigilance which was still requisite to guard the boon which they had thus won against the ill-concealed treachery of the king, operated to cement the now English *people*, nobles and commoners, Normans and Saxons, together, into what ere long became a homogeneous whole.

The work, seems to have been but half accomplished in the minds of the men of power in England when they had the signature and seal of only one king. They do not seem to have regarded his act as necessarily binding upon his successors; and we accordingly find that within a fortnight after the successor of John, Henry III., was crowned, although he was but then nine years of age, he ratified and renewed this charter with great solemnity, but with sundry modifications which the circumstances of the time seemed to require. This was repeated several times during the reign of Henry III., and by successive sovereigns, till the same had been gravely and solemnly confirmed more than thirty times down to the time of Henry V.; there being a disposition on the one side to evade, and on the other, as they had the king sufficiently in their power to insist upon his republishing or re-affirming the binding obligation of an instrument which took a variety of significant names, such as "Charta Libertatum," and "Communis, Libertas Angliæ," or "Libertatis Angliæ," "Charta de Libertatibus," "Magna Charta," and the like. (Coke Lit. 81 a.)

The copy of the charter commonly found in our law books purports to be that which Henry III. granted in the ninth year of his reign, and is sufficiently identical with that of John to be referred to for an explanation of its provisions. Before doing that, however, I ought to speak more fully of the place at which the original was signed, now so famous in history, known as *Runnymede*. It is said to have taken its name from "*Rune*," the Saxon for council, and "*Mede*," or, "the council meadow," where formerly the Saxons had held their councils. It is a meadow of about one hundred and sixty acres, lying along the Thames, upon the Surrey side of the river, about eighteen miles from London, near Egham, Staines, and Windsor Park. In the history of Surrey it is described as still being a meadow, which is turned into racing ground in August of each year. In the Thames there is a little island which is the traditional spot upon which the charter was actually signed; and upon the bank of the stream, upon its opposite side, stood the famous tree called the "Ankerwyke Yew," which is still green and fresh after the lapse of six hundred and fifty years. (3 Hist. Surrey, 224, 1 Knight's Hist. Eng. 347, 351.)—*Law Reporter.*

## EVADING TOLLS.

A very ingenous mode of evading the payment of toll at Whalley-bridge-gate, has been turned to a profit by a certain innkeeper, who made use of the evasion for the purpose of attracting customers to his house. It appears that the keeper of the White Hart has a field adjoining the inn, and between the inn and the entrance to the field, stands the Whalley-bridge-gate. Mellor, the appellant, who is a farmer, was driving 120 sheep from Tedding-

ton to Stockport along this turnpike-road, and the sheep were driven into the field in question before passing through the gates. Mellor passed the night at the White Hart, and next day drove the sheep out of the field at the opposite end and over other land, and into the turnpike-road at a point nearer the Stockport, so that no toll was paid.

The Stockport magistrate convicted Mellor of the offence of evading toll, and the appeal came on before the Court of Queen's Bench sitting in banco, on the 31st ult. The landlord was compelled to admit that he used to stay at his house all night in order to save the toll. "I tell my customers," he said, "that if they stay all night they can get over this land without paying toll."

The judges were unanimous in their opinion that the magistrates were right in convicting the appellant of an intention to evade toll. And if the only point in the case were that which the judges assumed to be so—namely, the intention of the appellant to evade, it is surprising that he should have had the audacity to appeal. We are not satisfied, however, that the case is within the letter of the Turnpike Acts, and, if not, every subject has a right to evade an impost if he can.

The Lord Chief Justice was probably correct in his suspicion that the landlord was the real appellant, and that relying on the uncertainty of the law, he chose rather to incur the expense of litigation with the possibility of retaining his lucrative calling, than by submitting to the decision of the magistrates to undergo the certain and positive loss of a large amount of custom.—*Solicitor's Journal.*

## UPPER CANADA REPORTS.

### COMMON PLEAS.

(*Reported by* S. J. VanKoughnet, Esq., M.A., *Barrister-at-Law, Reporter to the Court.*)

### The Chief Superintendent of Education in re Hogg v. Rogers.

*School Trustees—Power to levy school rate at any time.*

Under the acts relating to common schools, school trustees may *at any time* impose and levy a rate for school purposes: they are not bound to wait until a copy of the revised assessment roll for the particular year has been transmitted to the clerk of the municipality, but may and can only use the existing revised assessment roll.

[C. P., E. T., 1865.]

This was an appeal from a judgement of the Judge of the Fourth Division Court of the county of Grey. The action was trespass against the defendant, a collector of school rates for Union school section number one, in the township of St. Vincent, for unlawfully seizing and detaining a horse, the property of the plaintiff. The warrant under which the seizure took place was under the seal of the corporation of the school trustees of Union school section number one, in the said township of St. Vincent. It was dated February 22, 1864. Annexed to the warrant was a rate bill or list taken from the assessment roll of St. Vincent for the year 1863, dated February 20, 1864, but endorsed, Rate bill 1863. Plaintiff refused to pay the rate, whereupon defendant seized the horse upon the premises assessed. About four or five days afterwards, plaintiff paid the amount for which he had been assessed, and the horse was restord to him. The learned judge held that the trustees ought to have waited for the making and completion of the assessment roll for 1864, before issuing their warrant to the collector to levy the rate, and that the collector receiving in February a warrant for the collection of such a rate based upon the assessment roll for 1863, the year preceding, was not legally authorized to excute such warrant; that the only roll which a township collector is authorized to receive and act upon is the roll made up, finally revised and certified, and delivered to him on or before the 1st October in the year in and for which the taxes mentioned in the roll are to be collected, and the collector's power under his roll ceases on the 14th December following, unless prolonged by express by-law or resolution of the county council; and that a school collector has no greater power than a township collector, and must proceed under the same restrictions as to time and authority in the exercise of his duties. He therefore directed a verdict for plaintiff.

From this judgement the Chief Superintendent for Education in Upper Canada appealed. The case was first set down in the paper in Michaelmas term last, when *Hodgins* appeared for the appellant, and cited Con. Stats. U. C., ch. 64, sec. 27, sub-secs. 2, 11, 20; secs. 83, 109, 125; *Craig* v. *Rankin*, 18 U.C.C.P. 186; *Vance* v. *King*, 21 U.C. Q.B. 187; *McMillan* v. *Rankin*, 19 U. C. Q. B. 356, *Gillies* v. *Wood*, 13 U. C. Q B. 357; *Chief Superintendent of Schools re McLean* v. *Farrell*, 21 U. C. Q B. 441; *Doe* v. *McRae*, 12 U. C. Q. B. 525; *Doe re McGill & Jackson*, 14 U. C. Q. B. 113; *Spry* v. *Mumby*, 11 U C. C. P. 285.

On a subsequent day during the same term, *D. A. Sampson* appeared for the respondent, and the case was on his application allowed to stand over till the following (Hilary) term, when he again appeared, and cited *Timon* v. *Stubbs*, 1 U. C. Q B. 347; Rob. & H's. Dig "Notice of Action;" *Haight* v. *Ballard*, 2 U. C. Q. B. 29; *Donaldson* v. *Haley*, 13 U. C. C. P. 81; *Bross* v. *Huber*, 18 U. C. Q B 282; *Dunwich* v. *McBeth*, 4 U. C. C. P. 228; *Wilson* v. *Thompson*, 9 U. C. C.P. 364; Con. Stats. U. C., ch. 64, secs. 10, 16, sub-secs. 4, 34; ch. 49, sec. 13.

*Hodgins*, contra, cited *Newbury* v. *Stevens*, 16 U. C. Q. B. 65.

J. Wilson, J., delivered the judgment of the court.

The sole question in this case is, whether school trustees have authority in any year, before a copy of the revised assessment roll of that year has been transmitted to the clerk of the municipality, to impose and levy a rate for school purposes, upon the assessment roll of the preceding year.

The learned judge in the court below has taken great pains to review the common school acts in his judgment, but with great deference to his opinion, we have been unable to adopt his conclusions.

We think the error into which he fell arose from making the analogy between municipalities

and trustees, and township collectors and collectors under warrants of trustees identical, thus restricting the common school acts by acts not necessarily affecting them.

It is clear that school trustees may themselves, or through the intervention of the municipality, provide for the salaries of teachers and all other expenses of the school, in such a manner as may be desired by a majority of the freeholders and householders of the section at their annual meeting, and shall levy by assessment upon taxable property in the section such sums as may be required; and should the sums thus provided be insufficient they may assess and collect any additional rate for the purpose; and that any school rate imposed by trustees may be made payable monthly, quarterly, half-yearly, or yearly, as they may think expedient.

Many of the requirements of a school admit of no delay. The peculiar provisions respecting teachers demand great promptness in the payment of their salaries: repairs to school houses must be made when required. These may be sudden and unexpected. To oblige trustees, or those entitled to payment, to wait till the rolls of the year were made up, would be productive of great inconvenience, and if the law had been less clear than it is, we should not have felt justified in putting a stop to a practice which has, we learn, hitherto obtained, unless on grounds admitting of no doubt.

The general principle is, that levies for municipal purposes shall be made upon the revised assessment of the year in which they are made. It is true that one rate for the year is only struck by the municipal authorities: but suppose a sheriff got an execution either at the suit of the Crown or of a municipality in the month of January, would he be justified in delaying to levy until the revised assessment roll of that year was completed and a certified copy given to the municipality?

So if the requirements of a school section created a necessity for levying a rate, would the trustees be excused from performing their duty by saying we must wait till the assessment roll of the year is completed before we can act? The obvious answer would be, there is the last revised assessment roll, it is available for all purposes until the new one is made.

On reading the 86th section we find that no township council shall levy and collect in any section during one year more than one school section rate, except for the purchase of a school site or the erection of a school house, and no council shall give effect to any application of trustees for the levying or collecting of rates for school purposes unless they make the application to such council at or before its meeting in August of the year in which such application is made.

But the 12th sub-sec. of sec. 27 authorises the school trustees to employ their own lawful authority as they may judge expedient for the levying and collecting by rate all sums for the support of their school, for the purchase of school sites, and the erection of school houses, and for all other purposes authorised by the act to be collected.

It is to be noted, that the legislature did not confer on the trustees the power to apply to the township council at any time they chose to levy rates; but at or before its meeting in August, and then only for one rate, except *for the purchase of a site*, or the *erection of a school house*. Suppose a second rate for a site or a school house were applied for in a part of the year from January to August, would not the council be bound to levy it? During this period there would be but the existing roll to use for the assessing of this rate.

The restriction to one rate, and the exceptions in regard to the rates authorised to be levied by the municipality for school purposes, lead us to infer that when the trustees chose to exercise their own authority to levy, they were not restricted, and might levy oftener than once for the payment of teachers and for the other purposes mentioned in the 27th section.

In the case of an arbitration between the trustees and a teacher, the arbitrators may levy, but the trustees are bound to do so; for by the 23 Vic. cap. 49, in case they wilfully refuse or neglect, for one month after publication of award, to comply with, or give effect to the award, they shall be held personally responsible for the amount awarded, which may be enforced against them individually by the warrant of the arbitrators. But if they are thus bound at any time to exercise their power to levy, it must necessarily be done upon the existing assessment roll. None of the authorities cited touch this question as raised; but looking at the scope of the acts relating to common schools, the duties imposed upon trustees, the exigencies of schools, and the powers conferred upon trustees to levy rates, we are of opinion that trustees are not restricted to making one levy, but may levy at any time as need requires it; and may use, and can only use, the last existing revised assessment roll for imposing the required rate. The appeal will therefore be allowed.

Appeal allowed.

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## Crooks v. Dickson.

*Covenant for rent—Interest—Reference to master—Defendant resident abroad—Con. Stat. U. C. c. 22, sec. 161.*

*Held*, that under Con. Stats. U. C. ch 22, sec. 161, the master is empowered to ascertain the amount for which final judgmet is to be entered not only in cases in which he could, but in cases which he could not before that act have computed what was due; and that the fact of the defendant being resident out of the jurisdiction, is no objection to a reference being directed for such purpose.

*Held*, also, that in an action of covenant for rent, and order by a judge in Chambers, directing the master to allow the plaintiff interest on the amount claimed on the writ of summons, not specially indorsed from the date of said writ, was properly made, although no interest was claimed in the declaration.

[C. P. E. T. 1865.]

*E. Crombie* moved for a *rule nisi* to set aside an amended order made by Mr. Justice Adam Wilson, in the words following:*

"Upon reading the summons in this cause and hearing the parties, I do order that the master of his honourable court, on the entering of the judgment in this cause, do, on the computation of the amount due the plaintiff, allow him interest on the amount of his claim endorsed on the writ of summons in this cause; and I do further

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* See page 211 for Chamber decision.

order that all further proceedings in this cause, from the date of the said writ of summons be stayed until an application can be made to this honourable court to rescind or vary this order, such application to be made this day, or as soon as counsel can be heard."

The original summons was served in this cause on the defendant as a British subject residing out of the Province, and he appeared to the writ. A declaration was filed and served on his attorney.

The declaration was in covenant on a lease of land in the City of Toronto: Breach, the non-payment of five year's rent and taxes, the yearly rent being £210, free from all taxes. The defendant pleaded to the declaration. To the plea the plaintiff demurred, and judgment was given for the plaintiff on the demurrer.

Richards, C. J.—When the learned judge made the order in question he understood that the whole matter in dispute between the parties was, whether the plaintiff was entitled to have interest added to the rent payable under the covenant set out in the declaration in entering final judgment against the defendant, and under that impression he made the order. The defendant's counsel, however, in moving his rule, contended that the plaintiff was not in a position to enter final judgment, not having signed interlocutory judgment, and not having had it referred to the master to see what was due the plaintiff. He further urged that as the writ was not a specially endorsed writ, and the proceeding was against the defendant as a British subject residing out of the jurisdiction, the damages must be assessed by a jury, and it could not be referred to the master to ascertain the amount for which final judgment was to be entered.

The motion was for a rule *nisi* to rescind the amended order, on the ground that the learned judge had no power to make it on the materials which were before him, and on the ground that, as the plaintiff after having made the application elected to give notice of assessment of damages, he was not, under the judgment of the learned judge, entitled to the order. If anything turns on the last point, he should first apply to the learned judge who made the order to rescind it.

The learned counsel in moving the rule stated he could find no authority for holding that it could not be referred to the master to ascertain the amount for which final judgment was to be ascertained, because the proceeding had been commenced against the defendant as an absent defendant. In Day's Common Law Procedure act, pp. 79, 80 & 81, it is laid down, that when the defendant is within the jurisdiction, in actions on bills, notes, awards, actions of covenant for rent (2 Wms. Saunders 107 N. 2), for mortgage money, or arrears of annuity, the writ may be specially endorsed. If the defendant resides out of the jurisdiction, there must always be an enquiry. Interlocutory judgment must still be signed in cases not within sec. 25, &c., of the English Common Law Procedure Act. The order to refer is obtained on an affidavit of the cause of action, and stating that interlocutory judgment has been signed The same course seems pointed out by Chitty's Archd. 11 ed. 922.

In note to *Holdipp* v. *Otway*, 2 W. Saunders, 107, it is laid down, that the court may, if they please, assess damages upon an interlocutory judgment, and give final judgment thereon, and inquisition is only a matter of course taken to inform the conscience of the court Buller. J., in *Thellusson* v. *Fletcher*, Dougl. 316; *Gould* v. *Hammersley*, 4 Taunton, 148, is said to have observed, that writs of enquiry are often sued out in cases wherein they are not necessary, as, for instance, in actions on covenants for payment of a sum certain.

In the same note to Williams Saunders, it is stated that Lawrence, J., in *Blackmoor* v. *Flemyng*, referred to *Holdipp* v. *Otway*, with respect to the prothontary's taxing interest by way of damages, and that it was at the plaintiff's option either to refer it to the prothonotary to do so, or have a writ of inquiry of damages.

In *Roe* v *Aplsey*, 1 Sid. 452, judgment was obtained in default upon a judgment, and it was moved for the plaintiff that the court should tax the damages, *namely interest*, without a writ of enquiry, and after some doubt it was referred to the secondry to tax the damages. The court will not only refer, it to the proper officer to compute what is due on bills of exchange and promissory notes, but also in covenant for rent, or for mortgage money, or for arrears of accounts: (page 107 *a*, Wms. Saunders, note *c*).

In Wms. Saunders (Vol. i. page 109 note 1), it is laid down, that "when the demurrer is determined, and the plaintiff is content to take damages only on the judgment on the demurrer, he may execute a writ of enquiry on the judgment, and enter a *nolle prosequi* as to the issues, which may be done at the time of entering final judgment." Upon the same principle, when one of the counts in the declaration is on a bill of exchange or promissory note, and there is a demurrer to that count and judgment for the plaintiff, and issues are joined on the other counts, the plaintiff may, according to the modern practice in cases of judgment by default on bills of exchange and promissory notes, which is substituted in lieu of a writ of enquiry, refer it to the officer to compute what is due for principal and interest on the bill of exchange, &c., on that count, before a *nolle prosequi* is entered as to the issues.

I have no doubt under the 161st sec. of the Con. Stat. U. C. ch 22, similar to sec. 143 of 19 Vic ch. 43, and sec 94 of Eng. Act, 15 & 16 Vic. ch. 76, that in all cases where a matter could be referred to the master to compute what was due in a cause before the passing of the Common Law Procedure Act, it can now be referred to the master to ascertain the amount for which final judgment is to be entered. I also think this power extends much further, and under the statute the courts will now direct the damages to be ascertained by the master in cases where they would not have done so before the passing of the statute. If the matter is properly before the master for his decision as to the amount for which final judgment is to be entered, I see no reason why interest to the full amount directed by the order may not be allowed to the plaintiff in the nature of damages: the authorities seem to warrant it. As to the reference not being regular when the defendant

resides out of the province, the statute seems to authorise and require a reference of this kind; and I see no reason for interfering on that ground.

The plaintiff, I presume, before he has his damages ascertained or enters his judgment, will see that he is in a proper position under the practice to have those steps in the cause taken. When the judgment is entered, I see no reason why the interest directed to be allowed by the learned judge should not be computed. The order does not in itself direct or permit the entry of the judgment at any particular time, and does not imply that the judgment will be entered when the plaintiff is not in a position to take that step. All the judge assumes to decide is the right of the master to allow interest. We think he has not on this point decided too favourably to the plaintiff, and we decline to grant the rule sought for.

Rule refused.

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## PRACTICE COURT.

(*Reported by* Robert A. Harrison, Esq., *Barrister-at-Law.*)

### Baby v. Langlois.

*Terms notice—When unnecessary—Service of notice of trial—Legal partnership—New and old business.*

A terms notice of intention to proceed is not necessary if the proceedings in the cause have been suspended by injunction, or delayed by consent or at defendant's request.

The same rule applies where, on the application for the injunction at the instance of defendant, plaintiff, during the pendency of the application, is placed under terms not to proceed with the action.

Where an attorney residing and practising in the county where the action is brought appeared there for defendant, formed a partnership with another attorney carrying on business there in their joint names, and then changed his actual residence to another county, leaving his name in the proper books in Toronto as still of the former county, and occasionally afterwards attended and did business in the former county, service of notice of trial on his partner there was held to be good service notwithstanding a private arrangement between the parties that the partner should only attend to new business.

[Hilary Term, 1865.]

This was an action of ejectment tried at the last Fall Essex assizes, no one appearing for defendant.

In Michaelmas Term, *O'Connor* obtained a rule to set plaintiffs verdict aside for irregularity with costs, 1st, on the ground that over a year had elapsed without any proceeding next before notice of trial, and no term's notice given; and, 2ndly, that no sufficient notice was served.

*Scott* shewed cause.

Hagarty, J.—As to the first ground, it appears on the affidavits that the last proceeding at law prior to notice of trial complained of was a notice of trial for the anterior assizes of 1862. Defendant commenced a suit in equity against plaintiff to restrain the ejectment, and for a conveyance on 3rd October, 1862, and notice of motion for injunction returnable 3rd November following. On return of the motion, at the suggestion of the court, it stood over to the hearing, and the now plaintiff was placed under conditions not to proceed pending the application, and the suit, consequently, was not proceeded with. Judgment was not given in Chancery till the end of August or beginning of September last, and then plaintiff proceeded by giving notice of trial.

The practice is thus stated in 1 Chitty's Archbold, 166 (1862): "It seems that the notice is not necessary if the proceedings in the cause were suspended by injunction or delayed by consent or at the defendant's request." In 1 Tidd's Practice, 468, 9th ed., cited in *Doe Vernon* v. *Roe*, 7 A. & E., page 14, it is said, "The rule was established for the purpose of preventing any surprise on defendant after plaintiff has lain by four Terms without proceeding in his action, and therefore it does not apply when proceedings have been delayed at defendant's request."

The rule seems clearly recognised in the cases cited in the text books, especially *Bland* v. *Darley*, 3 T. R. 530 (per Buller, J.); *Bosworth* v. *Philips*, 2 W. Bl. 784; *Stockton, &c., R W. Co.* v. *Fox*, 6 Ex. 127; *Watkins* v. *Haydon*, 2 W. Bl. 762.

Indeed, in the case in 6 Ex. it would seem that, at all events in a Term cause, when a cause was stayed by injunction, on its being dissolved plaintiff might proceed without fresh notice of trial. There the cause had stood over as a remanet.

I see no difference between being stayed by injunction, and by the plaintiff at law having to come under terms not to proceed at defendant's instance.

I therefore think this ground of objection fails.

Then, as to the second ground of objection. The commission day for Essex was 6th October, 1864. Mr. O'Connor was defendant's attorney, residing at Windsor, in Essex, the county where the land is situate, and so resided till after the motion for injunction. He subsequently came to Toronto, having formed a law partnership with Mr. Worthington, an attorney at Windsor, and business was carried on in the name of O'Connor & Worthington. Mr. O'Connor alleges that this partnership was merely for new business, and had nothing to do with any old suits in which he had been concerned alone, and that the fact of his removal to Toronto was very well known. The plaintiff swears that he knew nothing of any such distinctions between old and suits, and that Mr. O'Connor frequently attended at said office and did business there since his removal to Toronto. The notice was served on the 28th September on Mr. Worthington at his office in Windsor. It was left on the table before him, he at the time declining to receive it. On the commission day, Mr. O'Connor notified plaintiff that if he proceeded he would move for irregularity. It is also sworn that Mr. O'Connor had been practising at Windsor in partnership with Worthington for some months prior to the former removing to Toronto, and that the business appeared to be carried on after the removal in the same way as before. It is also sworn that in each of the books kept at Toronto under rules 136, 137, up to December last Mr. O'Connor's residence appears to be at Windsor, not Toronto.

I am not aware of any authority governing this case.

The case is that of an attorney residing and practising in the county where the action is properly brought and appearing there for defendant, and then forming a legal partnership with another attorney carrying on business there in their joint names, and then changing his actual residence to another county, leaving his name in the proper

books at Toronto as still of Windsor and occasionally attending and doing business in Windsor.

I am of opinion that I cannot hold service in Windsor office insufficient.

Any private arrangement between him and his co-partners as to new and old business ought not I think to make any difference.

The C. L. P. Act, sec. 61 provides for serving an attorney not residing or having a duly authorised agent in the county when suit was commenced, service then should be on his duly authorised agent at Toronto or upon himself wherever he resides; or if he has no authorised agent, then by leaving a copy for him in the office where suit was commenced marked as for him.

I think it would be a very hard construction to place upon the practice to set aside this service. The office at Windsor was Mr. O'Connor's office when the notice was served just as it was when he entered the appearance. He was there at intervals attending to local business, and the mere fact of his residing elsewhere ought not, I think, under the circumstances, to make the service void. Rule discharged with costs.

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### Keenan v. Fallon.

*Rule enlarged before a judge in Chambers—How far a stay of proceedings when not acted upon—Waiver.*

Where a summons obtained in an action of ejectment to set aside a judgment for part of the premises, was discharged by the judge in Chambers, a rule, during Easter Term, 1864, obtained to set aside the judges order discharging the summons, was enlarged by consent before a judge in Chambers, not acted upon either during the vacation between Easter and Trinity or during Trinity Term, and plaintiff in the vacation after Trinty Term, served issue book and notice of trial for the ensuing Fall Assizes, which were accepted without objection by defendant's attorney, who also at the time agreed to give the attaching to the issue book of any orders made by the court or judge, and agreed that the same might be added to the record. It was held that the verdict taken at the Fall Assizes, was, under the circumstances, regular and could not be set aside.

[Hilary Term, 1865.]

This was an application to set aside proceedings for irregularity in an action of ejectment.

The point for decision was simply this, whether the *nisi prius* record was entered and verdict for plaintiff taken on 8th November last, at Lindsay, irregularly, on the alleged ground that a rule of Practice Court of May, 1864, enlarged into Chambers by consent of parties, was in force, causing a stay of proceedings.

This rule was to rescind a judge's order discharging a summons to set aside the judgment entered by plaintiff for part of the premises, on a question of practice.

On the last day of Easter Term, the rule was enlarged by consent, endorsed to the effect that it was to stand enlarged in vacation, before Mr. Justice A. Wilson, on a day left blank.

It was said the intention was, that either party might give two days notice thereof; but the memorandum endorsed to that effect was never signed.

Nothing was done during all the ensuing vacation, nor during the following Trinity Term, and plaintiff gave notice of trial for the November Assizes, at Lindsay.

*S. Richards*, Q. C., for plaintiff. *H. Cameron* for defendant.

Hagarty, J.—I think plaintiff was entitled to treat the rule of Easter Term, 1864, as lapsed and abandoned by the defendant, on whom alone lay the burden of keeping it alive.

On 31st October last, the plaintiff's attorney served notice of trial on defendant's attorney, in Lindsay. The latter said nothing as to any obstacle existing, but on the contrary, at plaintiff's request, endorsed on the notice that he admitted the service of notice and issue book, and waived the attaching thereto any order made by the court or judge, that same might be added to the record, and he accepted the issue book as if said rules or orders were added.

On the commission day (it is contested whether before or after the record was entered) counsel for defendant told the plaintiff's attorney that he would move to set aside the proceedings for irregularity, on the ground of the old rule being still pending. A verdict notwithstanding was taken for plaintiff.

I have no doubt in my own mind, that the parties, after Easter Term, forgot all about the rule; and it is clear that defendant's attorney, when he endorsed the consent on the notice of trial, acted as if no such rule was pending.

I am of opinion that when notice of trial was so given, that rule should not be considered in any way a bar to plaintiff's right to proceed.

I therefore think his verdict was regularly taken, and must stand.

The case has been kept before the court on technical matters for many terms, and I think it can now be disposed of on clear and satisfactory grounds.

Defendant's rule must be discharged with costs.

*Per cur.*—Rule discharged with costs.

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### Field v. Livingstone.

*Enlargement of summons subsequently abandoned—Effect thereof as a stay of proceedings—Verdict in the meantime—Regularity thereof.*

Where in an action of ejectment, defendant on 15th September obtained an order for landlord to appear and defend, inadvertently containing a stay of proceedings; on 29th September defendant wrote for delay, and promised that plaintiff should not be effected thereby; on 6th October wrote to say he would require to put in a double defence, and probably apply to put off the trial; on 7th October obtained a summons for that purpose, which was served in Toronto and enlarged till 10th October, "without a stay of proceedings," and was on 11th October, the commission day of the assizes, again enlarged till 15th October and subsequently abandoned, *held* that it was the same under the circumstances as if never obtained, and that a verdict obtained by plaintiff during the pendency of the stay was regular. But leave, on terms, was given to defendant to defend on the merits.

[Hilary Term, 1865.]

This was an action of ejectment. On application made to set aside a verdict taken for the plaintiff at the last Fall Chatham Assizes, on the ground that no notice of trial was served, or regularly served, or served in sufficient time on defendant Wightman, and that the record was entered and verdict taken, pending a stay of proceedings on the merits.

On 15th September an order was made in Chambers on consent, admitting defendant Wightman to defend as landlord, and that in the meantime proceedings should be stayed.

It was admitted that this stay of proceedings should not have been in the order.

The assizes began on Tuesday, October 11th, 1864. On 29th September, 1864, Mr. Hector

Cameron, Wightman's attorney, wrote to Mr. Douglass, plaintiff's attorney, saying that he had not been able to prepare the notices of title, and that he could not let him have it till early the next week, but agreeing to place him in the same position as if no extra time had been allowed him.

On 7th October, Mr. Cameron's agent gave the required appearance to Mr. Douglass, who same day gave them notice of trial, and they admitted service as agents.

On same day Mr. Douglass received a letter from Mr. Cameron, dated 6th October, saying that he had sent up appearance but found it necessary to apply for leave to defend on length of possession, and to put off trial till the next assizes, as defence could not be got ready, &c. He says, "I consider notice of trial served and shall apply for summons in the morning as if it were;" and asking if Mr. Douglass would consent to its lying over, and if so, to telegraph, and that he would not proceed with the application.

A summons was granted in Chambers, dated 7th October, to shew cause why the double defence should not be allowed, and to stay proceedings in the meantime. This was served in Toronto on 8th October, on Mr. Douglass' agents. It bore the endorsement signed by the judge, dated 10th October, "Enlarged till to-morrow *without* stay of proceedings."

On the 11th October, being the commission day at Chatham, Mr. Douglass' agents attended, and had it enlarged till the following Saturday.

Immediately after this enlargement the agents remembering that the assizes were commenced, asked Mr. Cameron to let the enlargement be to the 12th, instead of Saturday 15th. This he declined; and the judge being applied to, declined in the absence of Mr. Cameron, to alter the enlargement.

This summons was afterwards allowed by Mr. Cameron to lapse—as he alleges thinking it useless, as he heard that the verdict was taken for the plaintiff, on Tuesday, the 11th October.

*W. Douglass*, for plaintiff. *H. Cameron*, for defendant.

Hagarty, J.—I am of opinion that after reading Mr. Cameron's letter of October 6th, received 7th October, declaring that he considered notice of trial as served, and also what had previously occurred, I must hold that notice of trial was duly served in sufficient time, and I think the statement in his letter, already quoted, must have escaped his recollection. If so, it remains to be considered whether Mr. Douglass regularly entered his record on Tuesday, 11th October, and took his verdict. The objection to this is, that the enlargement of the summons to allow the double defence on that day at his agents request, so stayed the proceedings as to tie his hands.

Had this summons been pressed on to a final disposition, there might have been a difficulty, but the defendant who obtained it allowed it to lapse, and it therefore appears to me that he cannot now be heard claiming any benefit from it. A different rule might have a mischievous and unjust effect. For mere purpose of delay in a suit about being entered at a distant assize, a defendant might obtain a summons which plaintiffs town agents, not knowing how to answer, might have to ask to be enlarged. The applicants subsequent abandonment of the summons, in my opinion, leaves the case and its progress as if the summons had never issued.

I cannot therefore say that the plaintiffs' verdict was irregularly obtained. Had the defendant's attorney desired to carry out the intention expressed in his letter of October 6th, viz., to put in the double defence and apply to postpone the trial, I think he might have taken a very different course. He made no mention in his summons served on Saturday in Toronto, and returnable on Monday, of any desire to put off the trial of a cause coming on the ensuing Tuesday, at Chatham. Had he obtained an order on its return to add this defence, he would still, according to his own shewing, have had to apply to postpone the trial. He could have applied on Tuesday at *nisi prius*, to have done so.

A careful perusal of all the papers leads me to the conclusion that the defendant preferred attempting to throw the plaintiff over the assizes, or to entangle him in some slip in practice, to taking that course which his letters indicated he intended to adopt.

The letter written on the 6th of October, and received on the 7th by Mr. Douglass, was calculated to disarm any apprehensions that a difficulty could arise, as to notice of trial. The enlargement, on the commission day of the assizes, of the subsequently abandoned summons, ought not, I think, under the circumstances, be allowed to defeat plaintiffs proceedings.

I have read the affidavits of defendant and his attorney, as to a meritorious defence—and assuming them to be true, I think after a possession of many years, an opportunity may be permitted to defend the title on the merits. But after what has passed, I think the defendant must be required to act promptly.

If within two weeks from the service of the order to be now issued, the defendant Wightman pay to plaintiff all his costs from notice of trial to the present time, including the costs of this application, the verdict may be set aside, and a new trial had. If he do not do so, then let the rule *nisi* be set aside and verdict discharged with costs.

Rule accordingly.

## COMMON LAW CHAMBERS.

(*Reported by* Robt. A. Harrison, Esq., *Barrister-at-law.*)

### Crooks v. Dickson.

*Covenant for rent—Right to interest—Computation by master—Judge's order.*

*Held*, that a plaintiff may claim interest on a demand for money rent made payable by a covenant contained in the lease executed by defendant.

But *quere* as to his right to recover interest on each instalment of rent as it falls due, without shewing a previous demand or other warning to defendant of an intention to demand interest in the event of non-payment.

In this case an order was made for the allowance of interest from the commencement of the suit.

*Semble*, the master ought not to allow interest on computation in such a case without a judge's order to that effect.

[Chambers, March 2, 1865.]

*Crooks* obtained a summons calling on the defendant to shew cause why the master should

not enter judgment for the plaintiff in this cause, and on computation of the amount due, why he should not allow the plaintiff legal interest from the respective times the rent fell due, and the costs of this application.

*Crombie* shewed cause. The interest claimed by the plaintiff cannot be computed by the master; and there is no objection to the entry of the judgment for the principal sum of rent so soon as the plaintiff abandons his claim for interest and enters a *nolle prosequi* to a claim for taxes which is contained in his declaration. The plaintiff's writ is not a specially endorsed writ claiming interest, nor is there any count in the declaration for its interest. He referred to *Westlake* v. *Crooks*,, 4 U. C. L. J. 46; *Conolly* v. *Teeling*, 12 Ir. C. L. Rep. Appx. 29.

*Crooks*, contra. The plaintiff in his notice of claim endorsed a demand for interest. The damages in the declaration are large enough to cover the claim for interest, and no count is necessary. The master can compute the principal sum in this case, because the action is brought on a deed for rent certain, payable at stated times; and he can also compute the interest. He referred to Bagley's Prac. 222; *Byrom* v. *Johnson*, 8 T. R. 410; *Campion* v. *Crawshay*, 6 Taunt. 355; *Wingfield* v. *Cleverly*, 13 Price, 53; Con. Stat. U. C., cap. 22, s. 161.

Adam Wilson, J.—The master may, I think, compute in a case of this kind. The jury may also allow interest upon such a demand for rent. The master always allows interest on bills of exchange and promissory notes, and on bonds and mortgages and other instruments of the like kind payable with interest.

The court has also allowed interest after affirmance of judgment on a claim for goods sold and delivered which were payable by a bill, but for which no bill had been given from the time the bill would, if it had been given, have fallen due. *Becher* v. *Jones*, 2 Camp. 428, note. The count in that case was upon the special facts and agreement. See also *Farr* v. *Ward*, 8 M. & W. 25.

But the court will not allow interest claimed by a special endorsement on the writ, except on bills of exchange and promissory notes, unless the contract either expressly or impliedly entitles the plaintiff to interest. *Rodway* v. *Lucas*, 10 Exchr. 674.

The Court of Chancery allows interest upon a legal debt, as on a covenant of a testatrix that her trustees should, within one month after her death, pay a sum of £1,500. *Knapp* v. *Burnaby*, 9 W. R., 765.

In *Randall* v. *Lopez*, 11 W. R., 652, the declaration contained a count for interest, the principal being for goods sold and delivered. Before action, the plaintiff had rendered a bill to the defendant, stating that interest would be charged on sums not paid within a twelvemonth, and charging on that bill 9 months interest from the end of the twelvemonth No particulars of demand had been delivered in the action further than an endorsement on the writ of summons that the claim was for goods sold and delivered, full particulars of which had been already delivered. The judge at the trial directed the jury they must not take into their consideration the claim for interest. Wightman, J., was about to make the rule absolute for a new trial, because the judge had not left the question of interest to the jury, but on being referred to *Chapman* v. *Becke*, 8 D. & L. 351, he said he would allow an appeal against his judgment, unless the plaintiff agreed to a *stet processus*.

The case of *Chapman* v. *Becke*, it appears to me, had very little to do with the case one way or the other.

In *The Hull and Selby Railway Co.* v. *The N. E. Railway Co.*, and *The Lancashire and Yorkshire Railway Co.*, 5 DeGex, Mac. & G, 872, the defendants gave notice of payment of rent into court. The plaintiffs gave them notice to pay the rent to them, and that if they did not do so, they (plaintiffs) would claim interest. The defendants paid the money into court. The plaintiffs applied to be allowed interest upon it, and it was allowed to them, both by the Vice-Chancellor and the Lords Justices on appeal. Lord Justice Turner, in giving judgment, said:—The defendants have paid the money into court without authority. By so doing they have at all events impeded, if they have not defeated the right to recover the interest at law, and I take it that this court has jurisdiction in cases where parties by taking advantage of its process have interfered with legal rights. I think this court has jurisdiction; and about the justice of the order there can I think be no dispute.

In this case this plaintiff might have distrained at law for anything I know to the contrary, although he did not do it. No doubt too, a jury might have allowed interest to him at the trial. But I cannot say conclusively that rent, the same as money for a debt which is due by a written instrument, impliedly carries interest; and yet it is but reasonable interest should be allowed upon it from the time it becomes payable, for it is a debt, and of a specific sum of money, payable at a certain day, and if not paid at that time the plaintiff is a loser by the defendant's neglect.

Upon consideration, I must say that I cannot see any absolute distinction between a bond or covenant to pay so much money in different instalments and a lease to pay so much rent at certain stipulated days, and if the one is to bear interest I do not see any satisfactory reason why the other should not bear it also.

I am, therefore, disposed to place both such cases on the same footing, so as to have as few distinctions as possible where the rule and principle are really the same. Yet I am by no means prepared to say that the master was wrong in not allowing it, or even that he should have allowed it without a judge's order to that effect, for perhaps it should not be allowed in every case, although it may be proper to allow it in some cases.

But as the plaintiff claimed it as attaching upon the several payments from the times they respectively fell due, I think the master was quite right in not allowing it, for I am not disposed to do so myself. I will allow it, however, from the commencement of the suit, at which time the plaintiff, by his notice of claim, gave what I think may be considered as sufficient warning in this case to the defendant that he would be held responsible for interest.

I should have had no hesitation about it if the plaintiff had also claimed it in his particulars of

demand. Beyond this I do not think it proper to go. If the plaintiff is dissatisfied with this, he may either take his case to a jury, and run the risk of getting more, or he may appeal to the court for its decision.

Some of the cases I have referred to, warrant I think the exercise of the power upon such a claim.

If the defendant desire it I shall restrain the levy of the interest until the ensuing term to afford him an opportunity of moving against my order.

The order will go for the allowance of interest upon the rent due from the commencement of this suit, but not to be levied for until after the fifth day of next term.

Order accordingly.*

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### In re Davy, One, &c.

*Attorney—Delivery of several bills for same services—Which to govern—Duty of master—Taxation how conducted.*

An attorney having once rendered his bill, is not at liberty after steps have been taken to have it taxed to add to it, or to deduct from it, without leave of the court.

If he has rendered his bill making charges in a lump sum, though he may perhaps make up items to show that the lump sum is correct as to the amount, yet he will not be allowed to recover or tax more than the amount so charged.

If, through mistake, he has delivered a bill which is erroneous, he may, by a special application showing clearly how the mistake has arisen, be allowed to amend his bill or deliver another, but not of his own mere motion.

The master may, where a general bill has been rendered and the same bill in detail, refer to the items in detail to tax up to the amount first charged, but not to exceed it; and if the aggregate be less, the master may tax less, but not more.

The bill is one entire matter, and in taxation the client cannot separate certain charges for taxation and ask that they alone be referred.

[Chambers, April 4, 1865.]

This was an application to refer an attorney's bill to taxation.

Messrs. Foulds & Hodgson, of Montreal, having employed Mr. Davy to take proceedings to set aside certain judgments against one Lord, or to bring actions for them and other creditors of Lord, to recover their claims against Lord's estate, he having absconded. Mr. Davy did set aside certain judgments, and recover from Lord's estate a considerable sum of money. In July, 1864, Mr. Davy rendered his account current, to Messrs. Foulds & Hodgson, crediting himself with taxed costs in seven of the suits brought by him against Lord's estate, and as to two other items, charging to the following effect:—Amount of costs as per bill *White* v. *Lord*, $87 54; amount of costs as per bill in *Re Lord*, $374.

The bills were entitled as follows:—

In the court of Common Pleas—*John R. White* v. *Eli Harvey Lord* and *David A. Rose*, costs of application to set aside plaintiffs judgment. Then follows the items usually charged, commencing with instructions, $2, and ending with bill and copy and term fees; the whole being added up $87 54.

The other bill was headed in *Re Harvey Lord*, retainers for Montreal creditors, instructions $2; retainer as per agreement, $30. Then follow various charges for costs, expenses, consultations, letters and opinions, fees paid, retainers to counsel, various charges. The three last being as follows:—Attending at Kingston to see Mr. Foulds, $10; paid Mr. Wilkes expenses to States to find Lord, $75; eighteen days time, $5 per day, $90. The whole adding up $366. On turning over the leaf there were the further items. 4 letters and paid and attending to forward, $4 50; bill and copy, $1 50; term fees, $2; total, $374. On the back was endorsed, "In *Re Lord*, bill of costs, $374;" and at the bottom, "B. C. Davy, Napanee," apparently in the same hand-writing as the body of the bill.

The other which was endorsed "C P., *White* v. *Lord*, bill of costs, $87 54," "B. C. Davy," was apparently in the same hand-writing.

On the 30th November, Messrs. Foulds & Hodgson caused a summons to be issued, calling on Mr. Davy to shew cause why his bills of cost delivered to them, should not be referred to the master to be taxed, and why he should not give credit for all sums of money received by him from or on account of the plaintiffs in the said several suits referred to in the bills and each and every one of them in respect of any of the matters in the bills contained and from and on account of Foulds & Hodgson; and why he should not refund to them what (if anything) may upon taxation appear to have been over paid; and why the master should not tax the costs of such reference, and certify what shall be found due from either party; and why Davy should not be restrained from commencing any action touching such demand pending the reference; and why on payment, Davy should not deliver over all papers, &c.

On the same day another summons was obtained, at the instance of the same parties, calling on Mr. Davy to shew cause why he should not deliver a bill of costs, with the title of the court, style of cause and items, and amounts in detail referred to in the account current, in the causes and amounts following:—

| | | | |
|---|---|---|---|
| *Lauvier* v. *Lord* | ——— | ..... | $57 50 |
| *Martin* v. " | ——— | ..... | 86 38 |
| *Thayer* v. " | ——— | ..... | 42 85 |
| *White* v. " | ——— | ..... | 87 84 |
| *Foulds* v. " | ——— | ..... | 99 05 |
| *Thurber* v. " | ——— | ..... | 113 44 |
| *In re* v. " | ——— | ..... | 20 00 |

and give credits therein for all monies received from or on account of the plaintiffs in the several matters or suits, or from or on account of Foulds and Hodgson, respecting the same. These summonses were from time to time enlarged, and came on for argument before the Chief Justice of the Common Pleas.

Mr. Davy produced an account of about sixteen pages, commencing Messrs. Foulds & Hodgson To Benjamin C. Davy Drs. costs as between attorney and client, *In re Eli Harvey Lord & Co.* He then proceeded to give the items in that matter. It was not added up, but on being added up at what appears to be the closing charges in relation to that particular proceeding, it made the sum of £110 18s 7d —$443 72, instead of $366 in the former bill of items rendered. Then followed *White* v. *Lord*, the charges in which amounted to £23—$92—instead of $87 54, as in the former bill. Next followed the items in

* Plaintiff, in the ensuing term, moved the Court of Common Pleas to rescind the order, but it was sustained by the full Court, and plaintiff's rule discharged as appears by the report on page 207.

*Foulds* v. *Lord*, amounting apparently to £81 19s —$127 80—instead of $99 05, as in first account; *Thurber* v. *Ward*, £34 12s. 5d —$138 48—in former charged as costs taxed, $113 44; *Thurber* v. *Ward*, another suit, £11 18s. 8d.—$47 73—in first account charged as costs taxed, $42 95; *Linton* v *Ward*, £12 18s. 7d.—$51 72 —in former charged costs taxed, $42 95; *Lauvier* v. *Lord*, £17 5s. 8d.—$69 13—in former account charged costs taxed $57 50; *Martin* v. *Lord*, £25 2s. 11d.—$100 48—charged in former bill as costs taxed, $86 38.

The sheriff's fees on the foregoing executions were charged in the first account separately, and they were added into each suit by the bills last rendered.

There was in the last bill items of charges in the suit of *Fraser* v. *Lord*, amounting to £22 2s. 5d., of which no mention was made in the first account rendered. The whole amount with which Mr Davy credits himself in first account, is $1,069 80, and charges himself with $969 80, leaving a balance due him of $100. In the last account, he charged against his clients, £311 19s. 5d., and credits them with £267 7s. 3d., leaving £44 12s. 2d. due him.

Mr. Davy filed an affidavit, dated 12th December, 1864, which gave a statement of his being employed in these matters by Messrs. Foulds & Hodgson, and that they were to be answerable for his costs; then stated that the bills referred to in the two several applications now pending in this matter, are parts of his bill for business transacted by him for Foulds & Hodgson, in respect of said claims by the Montreal creditors, against Lord's estate. That he was advised that the several bills of costs incurred by him, in respect of the several claims so placed in his hands as aforesaid, and for which Foulds and Hodgson are liable to him, are in fact, and ought to be treated as an indivisible bill, as between him and Foulds & Hodgson; that he was perfectly willing to have the whole of his said bill referred to taxation, if Foulds & Hodgson so desire it; but objected to Foulds & Hodgson obtaining a reference as to such particular parts of the bill as they may select, on the grounds that the same is unfair to him and unwarranted by the practice of the court; that since the application in this matter was made, (the applicants never having made any previous application to him for delivery of his bills) he had caused his said bill to be made out in full, and had forwarded the same to his agent in Toronto, for service on the agents or attorneys of the said Foulds & Hodgson, which was the bill secondly delivered and which taxed the bill first delivered, as already mentioned.

*J. B. Read*, for the application.

*Gwynne*, Q.C., contra.

Richards, C J.—The first question is, whether an attorney's bill delivered by him to his client, though not signed, can be taxed? I think the authorities establish that it may be taxed. The statement of account rendered by the attorney here to his clients, as to the cases in which judgments were entered, in effect charges them with the costs taxed in each suit, and in the proceedings in which the costs were taxed, he sends them the items in the form of regular bills of costs in each proceeding. He credits his clients with money received, and claims a balance yet due, of $100. He does not intimate that he has any farther charges against them in these matters, or any further bills to render. I think the clients had a right to consider these were the charges their attorney had deliberately determined on making against them, and that he is bound by the bill or account so rendered.

The doctrine established by the modern cases, as I understand them, is, that an attorney having once rendered his bill, is not at liberty after steps have been taken to have it taxed to add to it or deduct from it, without leave of the court; and if he has rendered his bill, making charges in a lump sum, he may perhaps make up items to shew that the lump sum is correct as to amount, yet he will not be allowed to recover or tax more than the amount so charged. If, through a mistake, the attorney has delivered a bill which is erroneous, he may by a special application, showing clearly how the mistake has arisen, be allowed to amend his bill or deliver another, but not of his own mere motion.

I am inclined to think that the bill or account of an attorney is one entire matter, and in taxation the client cannot separate certain charges for taxation, and ask that they alone shall be referred. If they desire to have the bill as rendered taxed, I think they are entitled to their order. If they do not wish the items of the bill considered before the master, and are willing to allow them as correct, they need not trouble the master with them. If they dispute the amount which is charged, I think that under the circumstances it would be right to allow the master to refer to the items in detail as furnished by the attorney, to tax up to the amount charged, but not exceed it, and if the aggregate be less, the master can tax less. As to the bills delivered in which the items were made up, they must be taxed as delivered.

I refer to the following cases:—*Billing* v. *Coppock*, 1 Ex. 14; *In re Carven*, 8 Beav. 436; *In re Walters*, 9 Beav. 299; *In re Wells*, 8 Beav. 416; *In re Catlin*, 18 Beav. 508; *Re Blakesley & Beswick*, 32 Beav. 379; *In re Telleard*, 32 Beav. 476; *Ivimey* v. *Marks*, 16 M. & W. 848; *In re Salt*, 31 Beav. 488; *Pigott* v. *Cadman*, 1 Ex. 837; *In re Chambers*, 11 L. T. N. S. 726.

Order accordingly.

## ELECTION CASES.

(*Reported by* R. A. Harrison, Esq., *Barrister-at-Law.*)

### The Queen ex rel. Ford v. Cottingham

*Assessment roll—Conclusive as to property—Franchise to be favored—Residence—Onus of proof—Con. Stat. U. C. cap. 54, s. 75 and 97, sub-sec. 9.*

*Held*, that the revised assessment roll is as to property qualification binding and conclusive as to the several persons therein rated

*Held* also, that the inclination of the courts is to favor the franchise.

Where the votes of householders were attacked as not being householders resident for one month next before the election, and the fact of non-residence was not clearly shown, the votes were sustained.

[Common Law Chambers, March 1, 1865.]

*Hector Cameron*, on the 6th of February, 1865, obtained a writ of summons in the nature of a

*quo warranto*, directed to the defendant, to show by what authority he exercised the office of councillor for ward number one of the township of Emily, and why he should not be removed from the same, and the relator declared duly elected in his place.

The statement of the relator set forth that he had an interest in the election as a candidate for councilman, and the objections were—1st. That the election was not conducted according to law, the returning officer having refused to administer the oaths of qualifications required by the statute to certain persons who voted, although duly requested by the relator so to do. 2nd. That the defendant did not receive a majority of votes of persons duly and legally entitled to vote thereat 3rd. That he, the relator, received a majority of legal votes polled, and was duly and legally elected.

The application was supported by the affidavit of the relator, which stated that the returning officer refused to administer the oaths required by law to John McNeily and Alexander Shannon, two electors, who voted for the defendant, and having refused to administer the oaths to these electors, he considered it useless to ask the returning officer to administer the oaths to others of the voters to whom he had objections. That he was advised and believed that the votes of twelve persons whom he named, including the two above named, and all of whom voted for the defendant, were bad and ought to be struck off. 1st. John McNeily, who voted in place of his son, who in truth was the person assessed, and whose name was on the roll. 2nd. Wm. Clarke, who although assessed in ward number one, for a shop, resided in ward number four, using only the shop for his business during the day. 3rd. Thomas Baldwin, who was not assessed on the last assessment roll, in respect of real property, but only in respect of personal property, and only occupies a house as a squatter supposed to be on the road allowance. 4th. Robert White, a like objection. 5th and 6th. Wm. and James Anderson, who were jointly assessed as freeholders, but he had reason to believe that they are freeholders. 7th. Jas. Balfour, also assessed as a freeholder, but he believed that he had no interest in the property assessed. 8th. David Balfour, same objection. 9th. Matthew Larmer, assessed as a householder, the defendant being landlord, but relator was informed that the premises are a school-house and belong to the trustees of the school section. 10th. Alex. Scott, assessed as a householder, and to the best of relator's knowledge had no interest in lot as tenant or proprietor, nor did he live on the lot; he being a miller in the employment of defendant, and the house for which Scott was assessed being occupied by another. 11th. Wm. Cottingham, assessed as a freeholder, but relator believed he had no deed for the lot and no interest in it. 12th. Alex. Shannon, assessed as a householder, objected to as not residing in Emily for two months next before the election, being then residing at Port Hope. The relator further stated that the returning officer, although he (the relator) required him to administer to Alex. Shannon each of the oaths required by law, the returning officer only administered that portion of the bribery oath whereby Shannon was made to declare that he had not been bribed directly or indirectly at the election.

The relator, in support of the application, filed affidavits of other parties referring to each of the votes objected to, and testifying to the grounds alleged by the relator against the legality of the votes.

*C. S. Patterson* shewed cause, reading and filing, on the part of the defendant, several affidavits.

Gabriel Balfour, the returning officer, testified to a list of votes attached to his affidavit as being the one used at the election, and which was sworn to by the clerk of the municipality as a correct list of the voters for the ward, taken from the last revised assessment roll of the township. That the said list was used by him at the election, and was seen and handled by both the candidates and other electors and referred to by them, and that no objection was made to it As to the voter, John McNeily, when he tendered his vote the relator, or some one on his behalf, asked the returning-officer to swear him as being the person assessed, it being alleged that it was his son whose name was on the assessment roll, when the assessor being present explained that it was the voter who was assessed, and that the objection was then withdrawn and the demand to swear him waived. He stated that he was also asked to administer the oath to Shannon, as to his residence in the municipality; that he put the book into Shannon's hands, and was about administering it, having read over the oath preparatory thereto, when the relator or those acting with him insisted on the officer administering the whole oath or series of oaths in section 97, sub-sec. 9, of the Municipal Act, including that which referred only to the case of a new municipality, and that it was not from any unwillingness, but only from the excessive demand that the oath was not administered to Shannon.

John McNeily, referred to, swore that he was the person who voted for defendant, and that he is the person who was assessed on the last assessment roll. That his son, also named John McNeily, who resided with him was not assessed.

James English, the assessor of the township for 1864, swore that John McNeily the elder was assessed and not his son. He also swore that the voters Robert White and Thomas Baldwin, who were respectively assessed at $35 and $45, were so assessed for the respective houses occupied by them, and that he placed their assessments in the column for the value of personal property under the impression that householders were not rated as for real property, marking each assessment with the word "house," indicating that it was in respect of the said houses that they were assessed. A copy of so much of the last revised assessment roll as related to the persons who voted in ward No. 1 was put in, and which was sworn to as being true and correct by the clerk of the township.

Thomas Baldwin swore as to having voted for defendant, being assessed on the last revised roll as a householder. That the house in which he resided was a part of lot six in the first concession. That he had resided there for eleven years past as tenant to one David Balfour, and that he paid $18 rent a year and had done so for the last eleven years.

Morrison, J.—With reference to the alleged misconduct of the returning officer in the case of John McNeily, it is I think disposed of by the returning officer's affidavit as well as the affidavit of the assessor and the voter himself, which places it beyond dispute that the elector was entitled to vote.

Then as to the case of Shannon, the relator swears that he required the returning officer to administer each of the oaths required by law to the voter as he states, to test the truth as to the place of residence of Shannon prior to said election, as well as other matters connected with his right to vote. What the other matters were that the relator refers to is not stated. When I look at the explanation given by the returning officer and the series of oaths enumerated in sec 97, sub-sec. 9, I am rather led to think that the relator's object was merely to annoy the voter and not for any *bona fide* object, and we can well understand when a candidate resorts to such a proceeding that confusion and misunderstanding as to the circumstances will likely arise. I notice that the relator swears that in consequence of the returning officer refusing to administer the oaths to McNeily and Shannon he considered it useless to administer the oaths to others against whom he had objections, but by the copy of the poll book filed by the relator it appears that Shannon was the ninety-fourth person who voted, ninety-eight being the whole number, and of the last four, two voted for the relator.

Under the 75th clause of the Municipal Act, the electors of every municipality, &c., shall be the male freeholders thereof, and such of the householders thereof as have been resident therein for one month next before the election, who are natural born subjects, &c., of Her Majesty, of the full age of twenty-one years and *who were severally rated on the revised assessment rolls* for real property in the municipality, &c., held in their own right as proprietor or tenants. With regard to nine of the votes objected to by the relator, viz., number three to eleven inclusive, on account of the voters not having a property qualification, it appears that they are all rated on the last revised assessment roll, and were returned and entered in the list delivered to the returning officer.

Mr. Patterson, on the part of the defendant, objected to going behind the assessment roll, contending that the roll itself as to the property qualification is binding and conclusive. It is very apparent upon a reference to the various clauses in the municipal and assessment acts, both of which statutes are intimately connected with and depending upon the enactments of the other, that every care has been taken by the legislature to ensure a true and correct assessment and rating of property. Provision has been made for giving to the assessment rolls full publicity, and the right of objection by any elector to any matters appearing therein; among others, "if any person has been wrongfully inserted on it," and a mode of procedure is laid down affording ample opportunity to hear and determine all complaints and to revise all errors, &c., with a view to accuracy and finality, and we cannot but suppose that one of the objects of the legislature was to ascertain and determine who were entitled to vote. The 61st sec. of the Assessment Act enacts that the roll as finally passed, &c, shall be valid, and bind all parties concerned, notwithstanding any defect or error committed in or with regard to such roll, except in so far as the same may be amended in appeal to the judge of the county court.

A consideration of the 75th clause of the Municipal Act, declaring who are entitled to vote with the 9th sub-sec. of the 97th clause, which enacts what oaths shall be administered to electors, provisions being only made in the latter for matters *dehors* the assessment roll, in my judgment, strongly evince that the intention of the legislature was to make the roll conclusive as regards property qualification, and this view is strengthened by the words at the end of the 9th sub-sec., enacting that no enquiry shall be made of the voter, except with respect to the facts specified in the oaths.

No case was cited to me on the argument supporting the view taken by the relator's counsel, and I am not disposed, were it open for me to do so in the absence of anything to give effect to objections leading to the obvious inconveniences which would necessarily arise if held good. Were I to do so in my judgment one of the most important objects of our municipal system would be defeated. I am therefore of opinion that the objections made to the nine votes referred to are not valid and ought not to be allowed.

The only votes objected to remaining to be disposed of are those of Clarke and Shannon, who are objected to as being non-residents. With regard to Clarke it is known that he is assessed for property in two wards—No. 4 and the one in question; in the latter that he is assessed for a shop in which he carries on his business, being there during the day, while it is said that he sleeps and resides in the house of a family named English in the 4th ward, and that he is entitled to vote in that ward and consequently he is not entitled to vote in ward No. 1. It is not alleged that he voted in ward No. 4. The question of residence is a good deal discussed in *Reg ex. rel. Forward* v. *Bartell*, 9 U. C. C. P. 533, and in the cases therein cited. What is meant by residence is by no means a clear settled point. From the affidavits filed on the part of the relator, I cannot ascertain distinctly the facts of Clarke's position. It is not stated whether Clarke has a family or under what circumstances he sleeps in the house referred to, or whether he has done so for any period, or was he there at the time of the election. Erle, J., in 7 El. & B. p. 9, says:—"The fact of sleeping at a place indeed by no means constitutes a residence, though on the other hand it may not be necessary for the purpose of constituting a residence in any places to sleep there at all." I see nothing to satisfy me that the voter had a right to vote in ward No. 4, and considering as Richards, C. J., remarks, in the case *Reg. ex rel. Forward* v. *Bartell*, above cited, the inclination of the courts is to hold in favor of the franchise, I will hold that the vote is valid.

It is not necessary to dispose of the remaining vote, for if bad, which I think it is, the defendant would still have a majority of one, which would enable him to retain his office.

I am of opinion, therefore, that the office of councillor for ward number one of the township of Emily should be allowed and adjudged to the

defendant, and that he be dismissed and discharged from the premises against him, and do recover his costs of defence *

## CHANCERY.

(*Reported by* Henry O'Brien, *Esq., Barrister-at-Law.*)

### Willson v. Cramp.

*Insolvent Act of* 1864, *sec.* 3, *sub-sec. i.—Voluntary assignment not under act—Act of insolvency—Subsequent writ of attachment—Which to prevail.*

Where an insolvent debtor, subsequently to the coming into force of the Insolvent Act of 1864, makes an assignment to trustees for the benefit of creditors, not however under, or pretending to be under the Act, and upon which as an act of insolvency, proceedings are afterwards taken under the Act, such an assignment is void as against the assignee in insolvency.

[June 8th & 20th, 1865.]

On the 11th January, 1865, J. D Mackay, then being insolvent, made an assignment to Thomas Cramp and Andrew Milroy, two of the defendants, for the benefit of creditors upon certain trusts, which assignment was not and did not purport to have been made under the provisions of the Insolvent Act of 1864.

Proceedings were subsequently taken under the Act, and an attachment issued upon the ground that this assignment was in itself an act of insolvency, and that the estate of J. D. Mackay became liable to compulsory liquidation. One William Powis was appointed official assignee of the estate, but upon his death the present plaintiff, another official assignee, was appointed in his place. As this was the first case of the kind, the defendants, Cramp and Milroy, refused to hand over to the plaintiff the books of account and property of the insolvent's estate, without the direction of the court. Upon this the plaintiff filed a bill against Cramp and Milroy, and David and John Torrance, creditors of Mackay, setting out the facts and charging that the defendants Cramp and Milroy would, unless restrained by the injunction of the court, proceed to sell the said property and collect the debts due to the estate: that the said assignment hindered and obstructed the plaintiff in the collection of the said debts, and that the said assignment is by reason of its having been registered in several counties wherein the lands belonging to the said estate are situate, and for other reasons, a cloud upon the title of the plaintiff, and that the defendants David Torrance and John Torrance and Thomas Cramp were co-partners in business, and were the largest creditors of the said James Daniel Mackay, and were *cestuis que trustent* under the said deed, and for that reason made defendants to this suit The plaintiff therefore prayed that the said assignment to the said Thomas Cramp and Andrew Milroy might be declared to be void as against the plaintiff, and that the said Thomas Cramp and Andrew Milroy might be ordered to deliver up to the plaintiff all the books of account, vouchers, deeds, papers and documents, and all the goods and chattels belonging to the said estate, and to convey to the plaintiff the lands and premises conveyed to them by the said Mackay, and that the said Thomas Cramp and Andrew Milroy might be restrained by the order and injunction of this honorable court from intermeddling with the said estate and effects and from collecting the debts due to the said Mackay, and from retaining the possession of any of the goods and chattels belonging thereto, and from selling or disposing of any of the property real or personal, and that they might account to the plaintiff for such portion of the said property as had been converted into money and pay the same to the plaintiff.

The answer of the defendants admitted the matters of fact stated in the bill, and submitted to the judgment of the court as to whether the assignment to Cramp and Milroy was or was not void.

The cause came on for hearing on bill and answer.

*Roaf*, Q. C., for the plaintiff.

*Blake*, Q. C., for the defendants, Cramp and Milroy.

*S. H. Blake*, for David and John Torrance.

Mowat, V. C.—The question argued in this cause was whether an assignment for the benefit of creditors, on which, as an act of insolvency, proceedings are afterwards taken in insolvency, is void as against the assignees appointed under the act.

I am clear that it is. I think this apparent from the whole scope of the act. It is impossible to suppose that when the legislature made such an assignment an act of insolvency, it was intended that the assignee appointed under the act should receive none of the property of the insolvent, and that notwithstanding their appointment the estate of the insolvent should be administered by the trustees whom the insolvent had himself chosen to name. Such a construction would render futile the enactment which makes such an assignment an act of insolvency and would practically deprive the creditors of the advantages which the statute gives them, for the winding up of the estate of an insolvent debtor. If in addition to the clear evidence of the intention of the legislature, which the scope and object of the act supply, a direct enactment declaring such assignment invalid against assignees under the act were necessary, I think sec. 8 contains enough for this purpose. Take for example the third sub-section of that clause which expressly renders null all contracts or conveyances made and acts done by a debtor with the intent fraudulently to impede obstruct or delay his creditors in their remedies against him, or with intent to defraud his creditors or any of them, and which have the effect of impeding, obstructing or delaying the creditors or of injuring them. The deed of assignment impedes and obstructs creditors in those remedies which the Insolvency Act affords, and on this ground similar clauses in the English Bankruptcy Act, 1 Jac. 1, ch. 15, sec. 2, and 6 Geo. IV. ch. 16, sec. 3, were decided in England to include voluntary assignments for the benefit of creditors: *Stewart* v. *Moody*, 1 C. M. & R. 777. As Lord Ellenborough observed in *Simpson* v. *Sikes*, 6 Maule & Selwyn, 312. "such a deed subjects the debtor's property to distribu-

* The ruling on the principal point decided as to the conclusiveness of the assessment roll was subsequently sustained by Mr. Justice Adam Wilson in two cases, viz., *Reg. ex rel Johnson* v. *Price*, and *Reg. ex rel. Milligan* v. *Johnston* (not reported); and by Mr. Justice John Wilson, in *Reg. ex rel. Chambers* v. *Allison* (to be reported)

tion without the safeguards and assistance which the bankrupt laws provide."

The assignment in question also attempts in some respects to put the debtor's property under a different course of application and distribution among his creditors from that which would take place under the insolvency law: *Dutton* v. *Morrison*, 17 Ves. 199. Thus it does not give the priority secured by the Insolvency Act to the clerks and other employeés of the insolvent.

Decree for plaintiff.

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The following decree was thereupon made, the order as to the costs being by consent of the parties:—

"* * This court doth declare that the assignment from James D. Mackay, in the pleadings mentioned to the defendants Thomas Cramp and Andrew Milroy, became, on the appointment of the plaintiff as assignee in insolvency of the said James D. Mackay, void as against the plaintiff as such assignee, and doth order and decree the same accordingly; and it is ordered that the said defendants Thomas Cramp and Andrew Milroy do by proper instruments, to be settled by the accountant of this court in case the parties differ about the same, transfer and assure to the said plaintiff, as such assignee, the estate and effects which are now vested in them under the said assignment to them, and it is ordered that the costs, charges and expenses of all parties, as between solicitor and client, be taxed by the said accountant and paid by the said plaintiff out of the said estate, and liberty is hereby given to any of the said parties to apply to this court as and when occasion may require."

## ENGLSIH REPORTS.

### Pristwick and Another v. Poley.

*Attorney—Authority to compromise an action.*

An attorney was instructed to bring an action for the price of a piano sold to the defendant, and was not forbidden to compromise the action, and his managing clerk agreed with the defendant to settle the action on the defendant's restoring the piano and paying costs, which arrangement was approved of by the attorney. The plaintiffs refused to assent to the arrangement.

*Held*, on a rule to stay all further proceedings in the action, that the plaintiffs were bound by the compromise, as it, was within the scope of the attorney's authority, and that therefore, the defendant was entitled to a stay of proceedings.

*Semble*.—In ordinary cases, an attorney entrusted with the general management of a cause, has power to compromise it unless expressly forbidden to do so.

[C. P. May 9, 1865.]

This action was brought to recover £38, the price of a pianoforte sold and delivered by the plaintiffs to the defendant. Previous to the trial, Swan, who was the managing clerk of the plaintiff's attorney, had an interview with the defendant on April 6th, 1865 and entered into an agreement with him to settle the action on these terms:—"The piano to be given up in full discharge of the debt in the action, and costs agreed at £9, to be paid by the following instalments: £5 to-morrow, and balance in a month from that date." Swan informed his principal (the plaintiffs' attorney) of this arrangement, who then directed him to carry it out. On April 7th the defendant's attorney sent to the plaintiff's attorney a cheque for £5. The plaintiffs, on being informed of the arrangement, declined to ratify it, and on April 8th, the plaintiffs' attorney wrote to the defendant's attorney stating that the plaintiffs were not inclined to accept the terms proposed, and inclosing in the letter the cheque for £5. The defendant then tendered to the plaintiffs the piano and £5, but the plaintiffs refused to accept them, and insisted on the action being proceeded with, or the price of the piano being paid, which latter not being done, the action went on.

The defendant then took out a summons to stay all proceedings in the action, the matter having been settled; this was heard before Keating, J., at chambers, and he declined to make an order, but stated he did so without prejudice to an application to the Court.

*Needham* having in this term, on affidavits setting out the above facts, obtained a rule calling on the plaintiffs to show cause why all further proceedings in the cause should not be stayed, the action having been settled.

*Prentice* now showed cause, and contended that the plaintiff's attorney had no power to make this compromise, having been only instructed to recover the price of the piano, which was a different thing from taking back the piano itself; and that, if any attorney were instructed to recover an estate, it would be going a great way to say that he might take money instead. [Keating, J.—Might the attorney have referred the case of an arbitrator, and then the arbitrator have directed that the piano should be given back.] No. He referred on this point to *Swinfen* v. *Swinfen*, 27 L. J. Ch. 491; *Swinfen* v. *Lord Chelmsford*, 29 L. J. Ex 382. [Byles, J., referred to *Fraw* v. *Vowles*, 1 E. & E. 839.] He further contended that, even if the plaintiff's attorney had power to make this arrangement, his clerk had not, as there were many things which, if done by or to an attorney, would bind his client, though they would not if done by or to the attorney's clerk; for instance, a tender to an attorney is good as against his client, but it is not if made to the attorney's clerk; so, also, notice of an act of bankruptcy to an attorney is notice to his client, but notice to the attorney's clerk is not. He cited on this point *Bingham* v. *Allport*, 1 N. & M. 398; *Pennell* v. *Stephens*, 7 C. B 987.

*Needham*, in support of the rule, contended that the plaintiff's attorney had full power to effect this compromise. He cited *Swinfen* v. *Swinfen*, 25 L. J. C. P. 303; 26 L. J. C. P. 97; *Thomas* v. *Harris*, 27 L J. Ex. 353; *Chowne* v. *Parrott*, 32 L. J. C. P. 197; 11 W. R. 668. [He was then stopped by the Court.]

Erle, C. J.—I am of opinion that this rule should be made absolute. This was an action by the plaintiffs against the defendants to recover the price of a piano; a compromise was effected, under which the piano was to be restored to the plaintiffs, and certain costs were to be paid to them; the plaintiffs denied the attorney's authority to make the compromise, and proceeded with the action, which was an action for damages. This is a question between third parties, and not between attorney and client. It is clear that no express prohibition was given by the plain-

tiffs to their attorney not to compromise, but they employed him simply to recover the debt, and we have to say whether, in the employment as attorney to conduct the suit, he had a general authority to make such a compromise as this. It is admitted that he had authority over all ordinary proceedings, and that he might compromise the action by taking a sum of money more or less; but it is said that he could not compromise it by taking the goods back instead of money. I think there is no difference between the two, for, if the action had proceeded and the plaintiffs had obtained judgment, the sheriff might have taken the piano, and sold it to satisfy the judgment. The piano, which the planitiffs were to receive back under the compromise, might be turned into money. It seems to me that he did not go beyond his authority in any respect. The case of *Chowne* v. *Parrott* lays down principles wide enough to include this case, and contains such a statement of the law as I am laying down now. In *Fray* v. *Vowles*, the action was brought against an attorney for compromising two actions, contrary to the express directions of his client; and it was he d that the plaintiff could recover against him; but in that case the compromise was contrary to the plaintiff's express directions. The case of *Swinfen* v. *Swinfen* was a very remarkable case in many respects, and is, in my opinion, a singular case, and does not lay down a general rule for guiding other cases; and the Master of the Rolls in his judgment, which was affirmed by the Lords Justices, was very much of that opinion. In that case, there was an extraordinary departure from the authority which was given, for the action was to recover an estate, and the compromise effected was to give up all claim to the estate, and to take an annuity for life instead of the estate, which, it was contended, went beyond the ordinary scope of a counsel's or an attorney's authority.

Byles, J.—I am of the same opinion. If an attorney, entrusted with the general management of a cause, had not power, while acting *bonâ fide*, and with reasonable skill and care for his client's interest, to make a compromise, it would be most injurious to the client. No authority has been brought before us showing that an attorney has not the power to effect the compromise. In the case of *Swinfen* v. *Swinfen*, 18 C. B 485, the first discussion was whether counsel had authority to make the arrangement which he did make, and Cresswell, J., says, at p. 503 —"But if counsel, duly instructed, take upon himself to consent to a compromise, which he, in the exercise of a sound discretion, judges to be for the interest of his client, the Court will not inquire into the existance or the extent of his authority." And Williams, J., says, at p. 505 —"I entirely concur with my brother Cresswell in holding that Mrs. Swinfen is bound by the compact," and Willes, J., says, at the same page, "as to the authority of counsel to bind the client by arrangements entered into in Court, I agree entirely with what has fallen from my brother Cresswell." Afterwards, when the case came before this Court again, the question arose as to whether Mrs. Swinfen had been guilty of a contempt of Court, for which the Court would grant an attachment against her, and Crowder, J., says, at p. 393 of the 1 C. B. N. S., "I have the misfortune to differ from the opinion expressed by my learned brothers when the former rule was discharged, and to which opinion they still adhere." So far, therefore, as the proceedings in the common law courts go, the authority of counsel to compromise is stated in the widest terms, indeed, in far wider terms than this case requires. The case in equity must be taken as a singular one.

Keating, J.—I am of the same opinion. If the rule that an attorney has authority to compromise an action were not to be established, great inconvenience and protracted litigation might be the consequence. I am far from saying that any goods might be taken to compromise the action, having nothing to do with it, but here the goods were the subject of the action, and therefore the taking them was quite within the most limited extent of the authority given to the attorney. I may say that the case of *Swinfen* v. *Swinfen* caused considerable sensation at the time it was decided, and as far as it was decided in this court it was not fully understood, for not only had Cresswell, Williams, and Willes, JJ., expressed opinions, but, on the second time of its coming before the Court, my brother Willes not being present, Cresswell and Williams, JJ., adhered to their former opinions that the compromise was within the scope of the authority of counsel, and they constituted a majority of the Court; but from the nature of the application which was for an attachment, and one member of the Court thinking that it was not right that an attachment should issue, the rule for an attachment was discharged. The case of *Swinfen* v. *Swinfen* rested on a peculiar state of facts, and is not to be put forward as any authority for limiting the power of counsel or attorney in a cause to compromise it.

Montague Smith, J.—I am of the same opinion. An attorney is the general agent of his client in all matters which may reasonably be expected to arise in the course of the case. It is most proper and usual and very frequently necessary, to effect a compromise, and the decisions establish that an attorney has authority to compromise. The question is whether the compromise, which an attorney makes, is within the authority. I think that this one was clearly within his authority. If, as was said by my lord, the plaintiff had been ultimately successful in the cause, and the damages had been assessed, he could only have an execution against the defendant's goods, and the sherriff would have taken the piano or some other goods, and the costs would have been greatly increased; the attorney therefore judiciously thought it would be better to settle the action If an attorney had not the power to compromise it would be an unfortunate thing for clients, for protracted litigitation would be the consequence. Opportunities for effecting a compromise may arise in the course of a case which may never occur again, and if an attorney had not the power of compromising, then it would tend greatly to protract litigation. It is within the course of authorities that such a compromise as this is within the scope of an attorney's authority.—*Weekly Reporter*

**Rule absolute.**

### Ex parte Beddoe, an Articled Clerk.

*Attorney—Articled clerk—Service interrupted by illness.*

A rule was granted that an articled clerk, who for two years had been prevented from serving by illness, but who, during that time had pursued his legal studies as well as his health would permit, should be allowed to be examined, and if found sufficient, admitted at the expiration of the five years from the date of his articles.

[B. C., June 14, 1865.]

*Day* made an application that an articled clerk might be allowed to be examined, and thereupon admitted at the expiration of five years from the date of his articles, if found sufficient.

It appeared upon the affidavits that the clerk had been articled on the 8th of June, 1860, and that he had served under them till 24th December in that year, when he was attacked by a dangerous illness from which he suffered for two years, till 5th January, 1863, and during his illness he had been confined to his house. In January, 1863, he resumed his services under the master to whom he had been articled.

It also appeared that during his illness he had pursued his legal studies as well as the circumstances would admit.

He referred to *Anonymous*, 9 L. T. N. S. 324, decided 9th November, 1863; *Ex parte Hodge*, 2 Jur. 989; *Ex parte Matthews*, 1 B. & Ad. 169.

Crompton, J.—Two years seem to be a long time, but the case comes quite within the *Anonymous case*, which refers to *Ex parte Hodge* and *Ex parte Matthews*. In *Ex parte Hodge* Mr. Justice Littledale takes the same view that I do. If the absence had been for less time than a year, I should not have felt any difficulty; but as the time is not longer than in the *Anonymous case*, I think I may grant the rule.

Rule accordingly.

—*Weekly Reporter.*

## GENERAL CORRESPONDENCE.

### *County Courts—Original Judgment Rolls as Evidence.*

To the Editors of the Law Journal.

Gentlemen,—With reference to the judgment reported in this present July number of the *Law Journal*, in *Patterson* v. *Todd*, is a *subpœna duces tecum* from a Superior Court, requiring the production by the clerk of an Inferior Court of a record of his Court, to be regarded as "*higher authority*." If not, why should the clerk of an Inferior Court be be placed in the position of refusing obedience to a writ running in the Queen's name, which charges a penalty for disobedience to Her commands. See rule 31 (Reg. Gen. T. T. 1856) H. C. & P. Act, 611.

Yours, &c.,

County Court.

[Rule 31 reads as follows: "No subpœna for the production of an original record, or of an original memorial from any regstry office, shall be issued, unless a rule of court, or the order of a judge, shall be produced to the officer issuing the same, and filed with him, and unless the writ shall be made conformable to the description of the document mentioned in such rule or order." The "higher authority" intended by the Court of Queen's Bench, is evidently the judge of the County Court. Why, in the absence of such a decision as *Patterson* v. *Clark*, a clerk who in good faith obeyed the writ of a Superior Court, commanding him to produce the rolls of his Court at a Court being held in the same building, and in good faith obeyed the writ, "acted improperly and deserved censure" we are at a loss to understand. He was we think, under the circumstances, in the absence of authority to the contrary, warranted in looking upon the subpœna as "higher authority," and free from censure. He is not, that we know of, bound to enquire whether or not the order referred to in the rule was produced to the officer issuing the subpœna. He had to presume that the subpœna was issued in accordance with the rule, and was, we think, in the absence of any law to the contrary, bound to obey the subpœna, or be in contempt.—Eds. L. J.]

### *Articled clerks—Preliminary examination—Salary question.*

To the Editors of the Law Journal.

Gentlemen,—In the last issue of your journal I saw a letter from a correspondent suggesting that articled clerks should be required to pass an examination before being articled, a very excellent idea, and if properly carried out would certainly raise the standard, and in a short time materially decrease the number.

Do you not think, Messrs. Editors, that this would be more likely to effect the desired end, and with much more justice to clerks at present under articles, than the method which I understand the Benchers of the Law Society intend to adopt, viz., not permitting the time of those clerks who receive a salary, during the time that they receive the same, to count as good service under articles, since many clerks, with small means, who have been articled *during* the last five years (never anticipating such a by-law as the one proposed to be introduced), will thereby lose the time and money already spent in studying their profession, and otherwise suffer material inconvenience.

Trusting that the Benchers, in passing any such by-law as the above, will give due consideratian to the position in which clerks at present under articles will thereby be placed,

I am, yours truly,

An Articled Clerk.

Toronto, July 12, 1865.

[We think the suggestion as to a preliminary examination of persons intending to article themselves for the study of the law, an excellent one. It is required in the case of students of the Law Society intending to become barristers, and should be required in the case of clerks intending to become attorneys.

We cannot say that it would, however, have all the effect desired by the profession and the Benchers. But we do not endorse the money standard as a safe one.

The fact that a young man is so circumstanced as to require to draw a salary during his clerkship, is no argument either against his ability or his learning; nor is the fact that he is affluent enough to live without such aid, any proof that he is possessed of either ability or learning. Should the Benchers adopt the money standard, they will not, we apprehend, make it *ex post facto* in its operation. Such a course would be cruel to many who can ill afford to lose a day, a week, or a month, while prosecuting the study of the profession which they have deliberately chosen.

Men who by their talents have acquired a position in the profession and comparative affluence, should not forget that some men have begun in poverty and reached a position equal to their own, which they never could have done under sumptuary laws such as said to be intended. But if such laws must be enacted for the good of the profession, they certainly should not be made retroactively to operate upon those who in good faith have commenced the study of the profession and perhaps spent years of the best part of their lives under a different state of things. Indeed we much doubt the wisdom of making the new regulations, if any intended, at all applicable to those articled before the passing thereof.—Eds. L. J.]

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To the Editors of the Law Journal.

Gentlemen,—Allow me to explain what I think your correspondent, "One of Them," means in his query in the July number of your Journal, which I shall endeavour to do by putting the same question in a different shape on my own behalf:

A. duly serves five years, but within that time only keeps one of the prescribed terms. He, however, re-articles himself afterwards for a further period, and keeps the term he had omitted under his first service. Is this a sufficient compliance with the statute, or is A. disqualified for admission?

Another of Them.

July 17th, 1865.

[We think that this is a sufficient compliance with the statute, and that A. would be qualified for admission.—Eds. L. J.]

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*Attorneys acting as Insurance Agents—Validity of Service of the Clerks.*

To the Editors of the Law Journal.

Gentlemen,—One of the questions to be answered by a clerk, at the expiration of his articles, is, whether he has been engaged or concerned in any profession, business, or employment, other than that as clerk to the attorney or attorneys, to whom he was articled or assigned

Now, in case a clerk is articled to an attorney who is also an insurance agent, or secretary of some society or other, and performs a part, or the whole of the business of such attorney, as such agent or secretaey, as well as his professional business, will it, in any way, affect his service under his articles, or rather would the Law Society, on an affirmative answer to the above question, refuse to allow the time so served.

By answering the above, at your earliest convenience, you will much oblige.

A Law Student.

25th July, 1865.

[No person shall be admitted an attorney, unless he has, during the term specified in his contract of service, *duly* served thereunder, and has, during the *whole* of such term been *actually* engaged in the *proper* practice or business of an attorney, &c. (Con. Stat. U.C. cap. 35, sec. 3, sub-sec. 1.)

We cannot say that accepting insurance risks is the "proper practice or business" of an attorney, and therefore cannot say that an articled clerk who devotes any part of his time to such business, "duly serves" "the whole of his term" in the proper practice of an

attorney, or been "actually engaged," *i.e.* during the whole of the term, in the proper practice of an attorney.

Where an articled clerk held the office of surveyor of taxes, during the time for which he was bound, although it appeared this occupied but an eighth part of his time, and that the remainder was devoted to the study of his profession, yet the court held this was not a service of his "whole time," and struck him off the rolls. (*Re Taylor*, 5 B. & Ald, 538.)—Eds. L. J.]

## REVIEWS.

The Magistrate's Manual; by John McNab, Barrister-at-Law. Toronto: W C. Chewett & Co., 1865.

The scope of this work is explained on the title page as being "a compilation of the law relating to the duties of Justices of the Peace in Upper Canada, with a complete set of Forms, and a copious Index,"—a most acceptable addition to the sources of information open to the magistrates of the country.

The book commences with a short sketch of the office of a Justice of the Peace, which is partly composed of an extract from an article in the December number of the *Law Journal* for 1863. The author complains that the remarks there made, though worthy of attentive consideration, are written in too condemnatory a spirit, and hints that the remedies proposed, with the exception of the first, would be of doubtful advantage. The first suggestion alluded to was, to amend the law by establishing an uniform mode of procedure in all cases of summary conviction, and giving a full set of forms, &c. The second was to transfer the jurisdiction in certain cases to Division Courts, leaving to magistrates the ministerial duties of the office, including the arrest of offenders. The third, taken from a suggestion by an English law periodical, was, the appointment of a clerk, a barrister of five years standing, in each petty sessional division.

The great difficulty in a new country like this, and there is no use in trying to disguise the fact, much as our author may condemn plain talking, is this, that there are so few men, comparatively, in country places, who have the education necessary, not, to understand and judge fairly and impartially of the matter brought before them, but to be conversant with and apply the general rules and statutes laid down for their guidance, and to draw the papers required in the conduct of the complaint they have to adjudicate upon. How can it be otherwise in a country like this? Why, even in England, where there is almost a limitless choice amongst men of first-rate education, with nothing else to do, and with much greater experience, the same difficulty is felt.

The second suggestion is, we still think, a valuable one, the one great difficulty being that it would throw much more work upon our already over-tasked county judges. The effect of it, however, would be, we think, to lessen the number of cases in which petty assaults and other trifling complaints, often much better allowed to die a natural death than be fomented and increased by a resort to the common expedient of "having the law of him." This course would to a great extent do away with the *fee* system; and we do not think that many of our readers, not even excepting our magisterial friends, would consider that any very great loss. Ugly stories have been told about this same system, which the large and respectable majority of the magistracy deplore as much as we do, and probably more, as any such irregularities are a direct reflection upon them as a body.

Enough, however, of the introduction. We are next given a practical sketch of the procedure of a magistrate's court, followed by a form of commission of the peace.

The statutes relating to the duties of magistrates with reference to indictable offences and to summary convictions (Con. Stat. U. C. caps. 102 & 103), are given in full, with explanatory notes on doubtful points.

The principal part of the "Manual," both with reference to the space it occupies and to the amount of information it contains, is the digest of the criminal law of Upper Canada. It is arranged on the principle of Burns' Justice, the matter being placed under the various heads in alphabetical order. A great mass of useful information is given in this way, which will make the work of great value to all desirous of ascertaining the law with reference to the whole criminal law of Upper Canada, as well as to magistrates. As an example of the style, we may notice the heading, "Cheating." It commences by giving, under the sub-head "False Pretences," the various sections of the statute, stating generally what those words signify, and the punishment awarded. Then, under the head, "Persons indicted for larceny may be found guilty of obtaining under false pretences," is given the section referring to that point, and then similarly the converse proposition. Then some general remarks on the subject of false pretences, and what is the legal meaning of the expression, "false pretences," with a reference to a case where the subject was elaborately discussed. Then, under the heads, "Offences within the statute," and "Offences not within the statute," short notes of decided cases as to what were and what were not considered as offences against the statute. It is not pretended, of course, in this part of the work, to give a distinct heading for every point that a person might wish to refer to; for instance, there is no heading, "False pretences," as one might expect; but any difficulty of that kind is obviated by

reference to the very full, complete and well arranged Index, which is given at the end of the book. We should have thought, as a matter of convenience, that it would have been better to have placed at the head of each page the name of the subject treated of in the page beneath, but the Index makes this a matter of no great consequence.

The Addenda contains further matter of information, on points not directly connected with the criminal law of the country, besides a chapter on evidence, which, though of necessity short, embraces all the principal points that a magistrate should be acquainted with in conducting an investigation.

Upon the whole we must congratulate Mr. McNab upon having produced a very useful book, and one, we doubt not, that will find a ready sale among magistrates and others concerned in the administration of justice. The experience of the author, in his office of County Attorney, must have been a great assistance in the preparation of the book, and would enable him to point out many things that might escape the attention of a merely professional man, however competent otherwise for the task.

The "Magistrate's Manual" is got up in Messrs. Chewett & Co.'s best style, the paper and binding being good and substantial, and the type evidently new. The price is $4.

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The Lower Canada Law Journal. Conducted by James Kirby, M. A., B. C. L. Printed and published by Penny, Wilx & Co., Notre Dame Street, Montreal.

We welcome the first number of this new publication. It is designed to supply a want for a long time felt in Lower Canada. While the profession there had the Lower Canada reports and the *Jurist*, affording all requisite information as to decided cases, there was no channel of communication between members of the profession, no legal publication of any kind containing original articles of interest to the profession. The *Lower Canada Law Journal* is intended to supply this want, and so far as we can judge from the number before us, is well calculated to carry out the intention. There need be no rivalry between it and the *Reports* and the *Jurist*. It occupies ground that neither of them touches, and if well conducted would do those publications more good than harm. It is in size and form nearly the same as the *Upper Canada Law Journal*, which in these respects is made its model. The number before us opens with a "Proem," wherein it is stated that the first number is not as good as will be its successors. We can only say, that if its successors prove as good as the first number onr brethren in Lower Canada will not have much cause of complaint. In it is contained an article on "Commission to the Bar of Lower Canada," and some remarks by George W. Stephens, advocating the establishment of a Law Reform Society in Lower Canada. Then follow some remarks on the remarkable case of Dr. Gubourin, a gentleman in good position who was prosecuted criminally for stealing a promissory note made by himself and swallowing it in order to escape detection, and who, owing to the bad character of the prosecutor as compared with his own good character, was acquitted, and other editorial matter. There are besides a review of a digested index to the reported cases in Lower Canada, which, according to the review, must be a useful publication; correspondence, selections and reports of decided cases, the whole making a number containing forty neatly printed pages of matter, each page in size equal to the page of the *Upper Canada Law Journal*. For the present the publication is to be a quarterly one. We hope soon to see it a monthly, commanding increased and increasing support. It merits success.

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Godey's Lady Book, for August, is received.

The embellishments in this number are numerous, viz: : The Fair Haymaker, a line engraving; a colored fashion plate containing six figures; a Thorny Path; a humorous engraving; a promenade suit for second mourning; Robe Jardiniere, Robe and Paletot (both from the establishment of A. P. Stewart & Co. of New York); the Tagres Talma from Brodie's emporium, and about sixteen other engravings. The letter press is equally full and entertaining, viz.: Mint, Anise and Cummin, by Marion Borland; El Dorado, a poem; Charlie, or how I gained my wish, by the authoress of "Notes of Hospital Life;" How to make Home Beautiful; The Casket of Memory, a poem by Wm. E. Pubor; The Beautiful Unknown, another poem, by Harwood G. Robertson; A Day's Journey, and what came of it; Passion and Principle, by Mrs. J. V. Noel, and many other pieces of poetry and prose too numerous to mention. The number is really a superb one, and all that can in reason be desired or required by the ladies, for whose information and delight this Magazine is so well designed.

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## MONTHLY REPERTORY.

### COMMON LAW.

Vidal v. Bank of Upper Canada.

*Affidavit of merits proper form of—Must disclose defence, except in interpleader case.*

The proper form of the general affidavit of merits is, that the defendant has "a good defence to the action on the merits." *Held*, therefore, that an affidavit by the attorney which stated that in his "opinion the defendants had a sure and certain defence legally and equitably" was insufficient.

*Held*, also, that on an application to set aside a verdict and grant a new trial, on the ground of

merits, the affidavit must disclose what the merits are. But *held*, that in an interpleader issue itself discloses what the defendant's claim is. (15 U. C., C. P., 421.)

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May 13.

Q. B. O'Hanlan v. Great Western Railway Company.

*Measure of damages—Carrier.*

In an action against a carrier for loss of goods by negligence, the measure of the damages is the market price of the goods lost at the place of delivery; and this includes three elements—(1) cost price of the goods at the place from which a person residing at the place of delivery would reasonably order them, (2) cost of carriage, (3) ordinary importers' profits.

Therefore, where there is, at the place of delivery, a market for goods of the same kind with those lost, the measure of damages is the actual current market price; but where there is no such market, the three elements above mentioned must be taken into consideration.

It is not necessary to give any evidence as to the average of importer's profits, but if the jury gave extravagant damages the Court would correct it. (13 W. R. 741.)

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EX. April 29.

Webber v. The Great Wetsern Railway Company.

*Railway company—Carrier—Contract by company to carry beyond its own line.*

The defendants were carriers of goods from Worcester to Chester. They forwarded goods by two different routes, first, by their own line the whole way, and secondly, by their own line to Stafford, and thence by the London and North-Western line to Chester. Goods were delivered to the defendants at Worcester, consigned to Chester, "via London and North-Western, Stafford."

Held, that there was evidence of an entire contract by the defendants to carry the whole distance. (13 W. R. 755.)

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EX. Chapman v. Cottrell. [June 3.

*Practice—Writ of summons—Jurisdiction—British subject residing abroad—Common Law Procedure Act*, 1852, *s.* 18.

A British subject, resident abroad, there made and signed a promissory note, and sent it by post to his agent in this country, who delivered it to the payee.

Held, that the cause of action arose within the jurisdiction of the superior courts of this country within the meaning of the Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76), s. 18. (13 W. R. 813.)

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## CHANCERY.

May 31.

V.C.S. Wormald v Maitland.

*Priority—Equitable mortgage—Constructive notice—Registration—Middlesex Repistry Act.*

Where B. deposited with C., to secure certain advances, the title deeds relating to leasehold property in Middlesex, together with a memorandum of deposit, (which was never registered) and afterwards subdemised the same property to D. and M. by an indenture, which was duly registered, but D. and M., on taking such demise, neglected to inquire after or require the production of the title deeds.

*Held*, that they were bound by constructive notice of the deposit of the deeds with C., who had, therefore, priority over their claim.

In such a case there is no difference in effect between actual notice and constructive notice. (13 W. R. 832.)

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V.C.W Blackett v. Bates. May 9, 10.

*Arbitration—Award—Specific performance—Jurisdiction—Common Law Procedure Act*, 1854, *s.* 17.

The 17th section of the Common Law Procedure Act, 1854, does not take away the jurisdiction of the Court of Chancery to enforce specific performance of an award made on a reference to arbitration by the orders of one of the superior courts of law.

The circumstance that a plaintiff has unsuccessfully endeavoured to set aside an award, does not dissentitle him from afterwards asking for specific performance of it. (13 W. R. 786.)

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L J. May 11.

Wakefield v. Llanelly Railway and Dock Company.

*Specific performance—Award—Uncertainty.*

An award which leaves some of the questions undecided, or leaves it in doubt whether some of the questions have been decided, cannot be be maintained. (13 W. R. 828 )

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## INSOLVENTS.

The Editors regret to notice that by some inadvertence a mistake occurred in the July number of the *Law Journal*, whereby the firm of Walter, Ross & Co., of Picton, appeared under the above heading. Walter, Ross & Co., were plaintiffs, not *defendants*, in an attachment issued under the Insolvent Act of 1864.

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## APPOINTMENTS TO OFFICE.

NOTARIES PUBLIC.

ALEXANDER BRUCE, Esquire, of Hamilton, Attorney-at-Law, to be a Notary Public in Upper Canada.

ALEXANDER RICHARD WARDELL, of Hamilton, Esq., Attorney at-Law, to be a Notary Public in Upper Canada. (Gazetted July 22, 1865.)

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CORONERS.

ROBERT TRACEY, Esquire, Associate Coroner, County of Peterborough.

HENRY PULTZ, Esquire, Associate Coroner, United Counties of Lennox and Addington. (Gazetted July 8, 1865.)

EDMOND ANDERSON BURNS, Esquire, M. D. Associate Coroner, United Counties of Huron and Bruce. (Gazetted July 15, 1865 )

JAMES PATTERSON, Esquire, M D., Associate Coroner, United Counties of Lanark and Renfrew (Gazetted July 22, 1865.)

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## TO CORRESPONDENTS.

"County Court"—"An Articled Clerk"—"Another of them"—"A Law Student"—under "General Correspondence."

"Student-at-Law," we have as yet been unable to obtain a satisfactory answer to your question.

## DIARY FOR SEPTEMBER.

1. Friday. Paper Day Queen's Bench. New Trial Day C. P.
2. Sat .... Paper Day Com. Pleas. New Trial Day Queen's B.
3. SUN ... 12th *Sunday after Trinity.* [Court sits.
4. Mon ... Paper Day Q. B. New Trial Day, Com. Pleas, Rec.
5. Tues... Paper Day Com. Pleas. New Trial Day Queen's B.
6. Wed.... Paper Day Queen's B. New Trial Day Com. Pl.
7. Thurs. Paper Day Common Pleas.
8. Friday .New Trial Day Queen's Bench.
9. Sat .... Trinity Term ends.
10. SUN ... 13th *Sunday after Trinity.*
12. Tues... Quarter Sessions & Co. Court sittings in each Co. Last day for services for York and Peel.
17. SUN... 14th *Sunday after Trinity.*
21. Thurs. *St. Matthew.*
22. Friday. Declare for York and Peel.
24. SUN ... 15th *Sunday after Trinity.*
29. Friday. *St. Michael.* Michaelmas Day.
30. Sat .... Last day for notice of trial for York and Peel.

## NOTICE.

*Owing to the very large demand for the* Law Journal *and* Local Courts' Gazette, *subscribers not desiring to take* both *publications are particularly requested at once to return the back numbers of that one for which they do not wish to subscribe.*

THE

# Upper Canada Law Journal.

SEPTEMBER, 1865.

## AN ADMIRALTY COURT.

And why not an Admiralty Court or a Vice-Admiralty Court in Upper Canada, as well as in any other country upon the border of a sea! For are not our lakes, as we modestly call them, in point of fact, great inland *seas*—not salt water, certainly, but none the worse for that as far as all practical purposes which water as a carrying medium can be put to. The commerce of our lakes is probably much greater than was that of the British seas when admiralty courts were first heard of in England. And if the mercantile marine required a court for its own exclusive use and necessities then and there, why not also now and here.

Again, these lakes are, in fact, what are termed "high seas." They are the common highway for the use of two nations—nations pre-eminent as the greatest maritime powers of the world. It is true that there are at present but two nations upon the borders of these seas, but just as important points of international law may arise between two as between twenty, and the events of the last few years tend to show how quickly a third or even a fourth power may start into existence and become interested in the questions of international and maritime law that have arisen and will yet and more frequently arise between us and our neighbours.

The use and operation of admiralty law, as we understand it, are twofold. In the first place in determining matters of difference arising upon our "high seas" between subjects of different nations (principally at present between the United States of America and Upper Canada as an integral part of the British empire), upon the generally well-understood principles of admiralty law, as founded upon the customs and practice which are received and prevail between nations in general for the mutual benefit and protection of their subjects, with a due regard to the rights and liberties of all, and upon treaties which two or more nations enter into to determine some particular question or dispute, or to provide for some reciprocal rights or immunities. In the second place they have a municipal jurisdiction to decide maritime questions as between the people of the country in which the courts are established.

As regards the former, statute law would avail nothing, as one country cannot make a statute which can bind another. Nothing but "international" law could be resorted to in such cases; but as to the latter it is of course competent for a nation to make any regulations for its own governance which may be considered expedient.

Admiralty law is as well understood where there is any court to administer it as any other law. If such a court were organized here, there would, we apprehend, be no practical difficulties that a little care and research could not surmount; being new to us it might not work very smoothly at first, but that is the case with all kinds of new machinery. It is not *law* we want provided, but a *court* to administer the law already made to our hands. The position in this respect seems very similar to that of equity in this country before the Court of Chancery was established; the principles of equity were acknowledged and understood, but there was no machinery to put those principles into practice.

Admiralty courts are two-fold, the Prize Court and the Instance Court—the former for trying what is or is not lawful prize, and for adjudicating upon all matters of prize, whether civil or criminal; prize being understood to

mean every acquisition made *jure belli*, of a maritime character. With this we have nothing, at all events at present, to do. What we want is something that will be practically useful in correcting and remedying many anomalies, abuses and defects that injuriously affect our mercantile marine.

We want something that will put our shipowners and mariners on a par with those of our enterprising and "go-ahead" neighbours. They long ago saw the advantage of tribunals for protecting their own interests in this respect, and made provision accordingly. The consequence of their having stringent laws and we none at all is most injurious to us, and many are the stories that have been told of the oppression practised upon Canadian masters and owners by unscrupulous officials on the other side. This may have been partly owing to their ignorance of admiralty law, but even this is an argument for our having such law administered on this side of the water. They have it now all their own way, and whilst they can in case of debts contracted for a Canadian vessel, or of collision, salvage, &c., where a Canadian vessel is concerned, tow her into an American port, and keep her there till the demands of the claimants or injured parties, or the salvors, are satisfied, or until bonds are given for the payment of all claims that may be established against her, a Canadian master has no help for it, and has not even the satisfaction of knowing that the same justice can be meted out to American ships. This bonding, moreover, is often a troublesome business in a foreign port, miles away perhaps from the owner, who may not even under the most favourable circumstances have sufficient means or credit to furnish the security that will be accepted, and the effect of this often is that the most exorbitant and outrageous demands have to be paid. A few parallel cases under similar laws on our side would have a wonderful effect in setting matters right; no man is so likely to be bullied as one that is incapable of taking his own part.

The benefits, however, would not end here. Those that would accrue in disputes or claims as between ourselves in matters nautical would be very great. Let us take a few cases for example. Courts of common law proceed *in personam*, Admiralty Courts *in rem*. The former can decide questions of contract express or implied, but the latter can do more, they can apportion a loss on equitable principles, proceeding more after the manner of the Court of Chancery. Suppose a case of collision. One, or it may be both the vessels are "libelled," and the executive officer takes possession until bonds are given. The proceedings in such case being very similar to the execution of a writ of replevin by a sheriff. The court hears the evidence, and, what is more, understands it. It then apportions the loss and orders such and such repairs to be made, or that such a sum shall be paid in lieu thereof.

Salvage, again, is a difficult subject for Courts of Common Law to deal with. Canadians are not wanting in daring or heroism, when the occasion for their exercise arises, but would it not be a great inducement to any man to know that his attempts to save a vessel in jeopardy would be likely to meet not only with a careful investigation, but a liberal reward, commensurate with the risk and toil of his self-imposed task, and the skill with which he may carry it out, instead of having to bring an action upon a doubtful contract or no contract at all, to be tried before a judge unversed in nautical matters, and a jury probably quite incapable of appreciating his services. Besides, perhaps, by the time he gets a verdict the owner of the vessel may be insolvent, and the vessel perhaps at the bottom of the lake.

So again with sailors wages. Seamen are proverbially improvident, and would generally sooner dance a hornpipe on the main truck in a gale of wind than go to a lawyer to enter a suit against the owner or master. Every facility should be given them to recover the amount of their hardly-earned wages. They can understand and appreciate stopping the vessel till their wages are paid. This is to them the orthodox nautical way of solving the difficulty, and they are right enough in thinking so.

There should also be some means of enforcing a contract for necessary repairs done to a vessel, so as to afford due protection to all parties. And these and other contracts purely marine, such, for instance, as agreements as to sailors wages, can only be satisfactorily determined by an Admiralty Court.

The difficulty of obtaining any satisfactory verdict from an ordinary jury has been alluded to. We venture to say, that in nearly every case which involves purely nautical questions, the jury know just about as much of the case

when they have given their verdict as they did when it was first opened, perhaps a little less. How can they possibly in the course of a few hours appreciate all the nice little manœuvres and manipulations that constitute "seamanship." They may know what wearing a coat is, but "wearing" a ship is to them a ridiculous absurdity; they probably understand but too well what "paying out" is in a financial sense, but "paying out" a hawser would be to them an unfathomable mystery; why, to them, the "helm" should, in case of emergency be sometimes "put up" and sometimes "jammed down," or "hard-a-weather" or "hard-a-port," or why it should be called "hard up," would rather bother them. A "dolphin striker" would suggest thoughts of spermaceti candles; and "flying kites" anything probably sooner than the advisability of getting the cat to scratch the mast. In Upper Canada, we are fortunate in having one judge capable of arriving at a sound decision from purely technical evidence, but that does not help the jury, unless they have sense enough to find a verdict according to the directions from the bench, if any are given. And as to the counsel, they generally appear to be in the same hopeless maze as the jury.

The constitution of an Admiralty Court would obviate all these difficulties. The judge, who of course must be a lawyer, and if conversant with nautical matters so much the better, at all events he would soon pick up a good general idea of them, would be assisted by the advice of a certain number of "assessors," as they are called in England, or men thoroughly acquainted with the sea and ships, generally old sea captains. The executive officer or marshall would be as it were the sheriff of the court. A clerk or registrar would also be required, but these, with the exception of occasional deputy marshalls or bailiffs, (custom house officers in distant ports might be commissioned to act for the marshall,) would be all.

Very little difficulty would be found in organizing such a court, and a consideration of the subject leads us decidedly to the conclusion that it must be a distinct court, complete in itself. No patching or tinkering, or, after the manner of legislators of the present day, giving "jurisdiction in the premises" to such and such a court or such and such a judge, will be sufficient. No sane man will say that our judges have not enough to do. Let us divide the labour, giving to each their own particular department, and the slight extra cost will more than be repaid by the benefits that will accrue from the protection that will be afforded to our shipping interests.

There is an Admiralty Court in Lower Canada, presided over by a very able judge. Its jurisdiction is said to extend as far west as Three Rivers, but no farther. There is no tide west of that place. But the existence of tide has, we fancy, as little to do with the necessity for an Admiralty Court as the existence of salt. The boundary strikes us as not only arbitrary, but absurd and illogical.

An Admiralty Court, or a Vice-Admiralty Court, or some tribunal with similar powers, let it be called what it may, we in Upper Canada must have sooner or later. The sooner, we think, the better. Let those that make our laws take the hint.

## LAW SOCIETY.

### *TRINITY TERM*, 1865.

#### CALLS TO THE BAR.

The following gentlemen passed the necessary examinations, and were called to the Bar this Term:

Messrs. A. T. Drummond, B.A., LL.B., London; C. F. Fraser, Brockville; George Holmested, Napanee; John Dougan, St. Catharines (all of whom passed on their written examinations, which were so satisfactory that they were not called on in the oral examinations). Richard Grahame, Toronto; C. A. Price, Kingston; D. B. McLellan, M.A., Cornwall; F. J. Joseph, LL.B., Toronto; G. M. Macdonall, B.A., Fergus; A. H. Thibodo, Kingston; D. S. Gooding, Goderich; J. A. Kains, St. Thomas; P. W. Darbey, London; Arthur Boswell, Toronto; J. M. Bruce, Hamilton; W. H. McClive, B.A., LL.B., St. Catharines; John Burnham, Peterboro'; J. H. Gilbert, Toronto.

#### ATTORNEYS ADMITTED.

The following is a list of the gentlemen to whom certificates of fitness were issued this term:

J. C. Dent, Toronto; Richard Grahame, Toronto; J. H. Gilbert, Toronto; J. Dougan, Toronto; F. McKenzie, Toronto; Joseph

Jakes, Toronto; Francis Cleary, Toronto; G. M. Macdonell, B.A., Fergus; Henry Smith, Cobourg; —— Slee, Barrie; A. H. Thibodo, Kingston; J. A. Kains, St. Thomas; —— Maclellan, Belleville; E. H. Tiffany, Toronto; F. J. Joseph, Toronto; F. W. Darbey, London; W. H. McClive, B.A., St. Catharines; J. G. Milne, Ancaster; Geo. Redmond, Brockville; John Burnham, Peterboro'; Arthur H. Sydere, London; J. S. Hallowell, St. Thomas; J. W. Ward, Toronto; B. S. Gilbert, Belleville; —— Bradley, Ottawa; —— Dunning; —— Thompson; R. S. Baird, Oneida; —— Kilvert; —— Lister, Sarnia; D. Stewart, Belleville.

The case of Mr. Maclellan, of Belleville, is deserving of especial notice, for though both deaf and dumb he passed we are informed a most creditable examination.

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Hon. George Sherwood, of Brockville, has been appointed Judge of the County of Hastings, in the room of the late Mr. Smart.

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## SCHOLARSHIP EXAMINATIONS.

The following resolution, passed by the Benchers of the Law Society, in Convocation, on the 14th February last, will be interesting probably to several of our aspiring young friends, and answers the question of a "Student-at-law" in another place. The rule reads as follows:—

"That all students who have been, or who shall hereafter be admitted upon the books of the Society in Easter or Trinity Terms in each year may present themselves for examination for scholarships as follows, that is to say: For the scholarship for first year students, in the Michaelmas Term of their second year. For the scholarship for second year students, in the Michaelmas Term of their third year; and for the scholarships for third and fourth year students, one or both, in the Michaelmas Term of their fourth year, provided always, that nothing herein contained shall authorize or permit any student to present himself a second time for examination for the same scholarship."

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Mr. O'Brien's book of practical and explanatory notes on the Division Courts Acts, Rules, &c., is completed, and is in the hands of the printer for publication. It comprises all the acts and portions of acts in any way affecting procedure in Division Courts, or the duties of Division Court officers; together with the Rules of practice and Forms, now we believe out of print, together with other forms of practical value; the whole being supplemented with numerous notes, which will doubtless be of great aid in elucidating and eventually helping to settle the practice of these now important courts.

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We see in a telegraphic despatch from across the boundary line that a store was "*burglarized*" a short time ago. We are sorry that any thing so dreadful should have happened to any of our inventive cousins. Truly the American language is "fearfully and wonderfully made." Just fancy the horror of an English judge reading an indictment charging a prisoner with having "feloniously *burglarized* and entered, &c. If it were *robboriously burglarized*, the expression would be complete and without a parallel.

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The efforts of the Lower Canada section of the House of Assembly, to carry us back to the "dark ages" of commerce, are admirable for their persistency, if for nothing else. The oft repeated endeavour to limit the rate of interest upon money by Legislative enactment has again been made. Experience, argument, and public opinion, seem equally to fail in convincing a prejudiced and retrogressive party. They are even impervious to ridicule. We cannot but think that the common sense of the House will again prevail.

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# SELECTIONS.

## THE ORIGIN OF MAGNA CHARTA.

(*Continued from page 205.*)

When we turn our attention to the provisions of this famous charter, we ought not to allow ourselves to form an inadequate estimate of what we have a right to expect from the men of that day. A large proportion of the people of England were little or no better than slaves. Villanage was the condition of her laboring classes. There was a feudal aristocracy throughout the kingdom, but the grand council of the State included only the bishops and the barons, while there was nothing like a representation of the commons in Parliament. And, in the absence of everything like an educated class of men, and without trade and commerce, and in the very infancy of the arts, there were few interests for which provision could be made beyond the feudal rights, duties, and burdens connected with the holding and

culture of the land, the privileges and immunities of the church, the personal security of the freemen, and the tardily-recognized claims to anything like consideration of a class of tenants who were gradually rising above a state of villanage or serfdom.

The charter contains thirty-eight chapters or sections, some of which are exceedingly brief. They do not follow any orderly arrangement in subjects, and the terms in which they are expressed are mostly so technical, and much of them so nearly obsolete, that it is impossible now to understand them, unless read in the light of surrounding circumstances, and with the knowledge of the meaning of the phrases and forms of expression in which they are couched. It would occupy too much space, as well as be too severe a tax upon your patience, to attempt to analyze these chapters. In fact, the course of events, and the change in the laws and customs of the kingdom, have rendered most of them of little interest beyond being matters of history.

The first section, as a peace-offering to the church, guarantees the whole of her rights and liberties, and declares them to be inviolable; and to all freemen of the realm the liberties which it then proceeds to enumerate. And this, it is said, is done "unto the honor of Almighty God, and for the salvation of the souls of our progenitors and successors, kings of England, to the advancement of holy church and amendment of our realm." I should have said that the charter was written in Latin, though law proceedings had been in the Norman-French language from the time of William the Conqueror, and continued to be till Edward III., when they were required to be recorded in Latin. And this continued to be done for about four hundred years, till the time of the Commonwealth, when the English was substituted as the law language of the kingdom.

The onerous burdens imposed by the feudal law upon the land-holders of the kingdom form a prominent subject in several of the chapters of the charter; and guards and protections against abuse were interposed between them and the king, to whom, as lord paramount, they were due.

In the first place, all proper feuds were those which were held by a vassal on condition that he performed certain military services, which was called knight-service, and was finally abolished, with all feudal tenures, in the time of Charles II. Many if not most of the principal baronial manors, were held directly from the crown, or, in technical terms, *in capite*. Among these feudal services, or rather fruits of feudal tenure, were *Relief*, *Wardship*, and *Marriage*. Reliefs were sums of money which an heir had to pay to the lord for the privilege of coming into the enjoyment of his ancestor's feud. At common law this was a fixed sum, but by the grasping disposition of the late kings this had become extremely burdensome and oppressive.

Wardship was still a more oppressive burden. By it, if an ancestor who was the king's tenant died leaving a minor heir, the crown took possession of his lands, farmed them out, making the most it could out of them, leaving the minor at his majority an estate stripped and wasted, and all he had received in return had been his own personal support.

Marriage was a still more odious fruit of feudal tenure. By it, if the vassal left a female heir under a certain age, the lord had a right to sell her in marriage for the best price he could get. In one case the Earl of Warwick received the sum of £10,000 for his consent to the marriage of his infant ward. If the infant refused to carry out the lord's bargain of her person and estate, she forfeited to him the amount he could have realized from it; and if she married without his consent, she forfeited double the value of such marriage.

The barons, being vassals of the crown, and owning military service for their lands, were immediately interested to mitigate these burdens and oppressive exactions; and several of the chapters of the great charter were aimed at these abuses. They struck at one of the principal sources of the income of the crown; and it is not, therefore surprising that the king should have reluctantly yielded to the required reform.

Another class of evils under which the freemen as well as the feudal landlords had been suffering, was connected with the administration of justice. The King's Bench was theoretically held by the king, and accompanied him wherever he went. Its writs and proceedings were returnable "ubicunque fuerimus in Anglia." At the head of this court there had been an officer called the Chief Justiciar, —generally imported from Normandy,—having the notions of a man educated in that feudal and now foreign country, clothed with great power, and exercising it with unrelenting severity. Not only was a suitor in this court obliged to follow the king wherever he might choose to go, and thereby be subjected to enormous expense, but when his cause came to be tried he found, practically, a foreign tribunal, in which justice was openly sold; and he could feel no assurance of obtaining his right, however clear. There were, also, courts held by inferior officers, in which matters of the gravest moment, even cases of a capital nature, were tried by men wholly incompetent by education or character to secure a fair or satisfactory result. In connection with this was a most important circumstance which, at that period of the law, might seriously affect the party arraigned upon a criminal charge. By a concession to the sanctity of the church, and from a regard to the sacredness of the office of priest, the courts of common law yielded their jurisdiction over clerical offenders to the trial and censure of the bishops and higher officers of the church. In determining who should be admitted to this exemption from punishment under the criminal law of

the realm, inasmuch as what little learning there was had been monopolized by those in holy orders, the test applied if any claimed the privilege or "benefit of clergy," as it was called, was to place in his hand a book, and require him to read. If he succeeded, he escaped punishment for most of the many offences known to the law, and several of them capital. The mode of doing this is thus described by an old author:

"The bishop must send to every jail-delivery a proper commissary. If the prisoner asks his clergy, the judge commonly giveth him a psalter, and turneth to what place he will. The prisoner then readeth as well as he can (God knows often very slenderly.) Then he asketh the commissary, *legit sit clericus?* The commissary must then answer, *legit* or *non legit.*"

Now, as the bishop would not attend an inferior court, if a man were held for trial, even for his life, in one of the courts held by the sheriffs or coroners, or other inferior officers, he had no chance to get the benefit of clergy; and this, of course, operated most unequally upon the persons charged with offences in the kingdom.

Other evils had grown up, and defects had developed themselves in the administration of justice, which the barons sought to obviate and correct by means of the charter. Thus the court of common pleas, in which most of the actions between subjects were heard, was thereby made stationary, and practically fixed at Westminster. Questions of title to lands were to be tried in the county where the land lay, and sheriffs and other inferior officers were prohibited from holding courts for the trial of considerable crimes. Nor could a man's land be taken for his debt due the crown, so long as he had goods which might be seized.

It will be recollected that in the discussions preliminary to our Revolution, constant reference was made to the Magna Charta as a standard of the civil rights of the colonists; and that one of the great causes of complaint was the power asserted by the crown of compelling a citizen of one of these colonies to answer for acts done here before the courts of England, so remote from the vicinage of the transaction.

One or two things in the charter may be referred to as illustrative of the intercourse and society in England at that time. It guards towns and freemen from being distrained to make bridges or banks "but such as of old time"; as they had been heavily taxed during the previous reigns under the pretence of maintaining fortresses, bridges, and the like public works.

No man had a right by the charter to claim exclusive control of a river merely because he owned the land upon its banks; and fishing-weirs then existing in the Thames, Medway, and other rivers in the kingdom, and which effectually interrupted their navigation, were, by the charter, to be removed. The significancy of these provisions was in the fact that these streams were the principal means of transporting commodities to and from market; and these weirs, among other things, prevented floats, or, as we should say, rafts, of wood from coming down these streams to supply the towns on their banks with fuel before the days of coal-mines. And yet it was nearly two hundred years after this before the weirs in the Thames between London Bridge and Staines, near Windsor, were wholly removed.

There is one clause in favor of extending protection to foreign merchants coming to England, securing to them safe ingress and egress, and passage through the kingdom. And another provision favorable to trade was requiring all measures of quantity and weight to be uniform.

An important, and, under the circumstances, a remarkable provision in the charter was aimed at the grasping spirit of monopoly and aggrandizement of the church. In an age of violence and the lawless abuse of power, the passions of men often led them to a course of life for which they felt it necessary to make some expiation in order to make their peace with the church, and win an entrance into heaven at last. No readier way offered itself than, like a man's giving up his vices after his power of indulgence has been lost, to leave to the church the fruits of a life of rapine and injustice. And in this way the monasteries and other church establishments were engrossing all the lands in the kingdom. As these church lands escaped many if not most of the feudal burdens which fell so heavily upon the other lands in the kingdom, the barons insisted upon an express clause in the great charter prohibiting all persons from giving their lands to religious houses. This is the origin of the laws still in force in England against *mortmain*, as it is called, or the falling of lands into the *dead hands* of ecclesiastical corporations.

If, now, we ask what provisions were made in this charter for the liberties, safety, or protection of the people, we shall find their number few, but at the same time most interesting and important in their bearing. Some of these are rather by indirection than any explicit declaration of what they intend to secure. Widows were relieved from the payment of feudal dues, like other tenants, in coming into possession of their dower lands, and were, moreover, permitted to occupy the mansion-houses of their husbands for the period of forty days, called a widow's "*quarantine*," after the death of their husbands,—a principal which has been substantinlly retained ever since, wherever the common law of England prevails.

There is a single clause only relating directly to that oppressed and down-trodden class then so numerous in England, called villeins. It is connected with a clause limiting the extent to which a freeman might be amerced, and is in these words:—"And any other's

villein than ours shall be likewise amerced, saving his *wainage*, if he shall fall in our mercy." It is the protection of his *wainage*, derived from the Saxon *wagna*, or *wain*, that is significant here, as it was by means of that that villeins were able to do the service of carrying out manure and other like work upon the lord's land, the doing of which was the feeble tenure by which he held his land. It was, in other words, protecting him from being stripped of the means of earning a livelihood; and it is upon this principle that to this day the tools of a mechanic are free from attachment, and the tools of trade and beasts of the plough, necessary for cultivating the land, are exempt from distress in enforcing the payment of taxes. It was in the case of the villein a boon, small in amount but of inestimable value to him, as it secured to him the means of subsistence. But even this favor, small as it was, was witheld from the tenants of the crown lands.

In process of time, however, villanage disappeared in Englaud, by a sort of outgrowing of it by the people, so that the general provisions of the charter in favor of the subjects of the crown, came to embrace, in theory at least, the entire people of the realm.

One provision in the charter had several of the properties of a process of Habeas Corpus; by it any one imprisoned upon a capital charge might have it inquired into whether the charge was made from hate and malice, or upon good and sufficient ground, and this process was to be issued without charge to the party applying for it.

But the great and significant clause of the Charter, upon which its claim to the admiration and veneration of every successive age rests, is the 29th chapter or section; it is so broad in its terms, and extensive in its application, that it may be justly regarded as embodying the great principles of civil liberty, as well as of personal rights and protection, under a wise and just administration of law, which have their foundation in the English common law. I follow the words of Lord Coke in the very awkard and inelegant translation of this clause. "No freeman shall be taken or imprisoned, or be disseised of his freehold, or liberties, or free customs, or be outlawed or exiled, or any otherwise destroyed, nor will we not pass upon him, nor condemn him, but by lawful judgment of his peers, or by the law of the land." The original closes with these noble and often quoted words: "Nulli *vendemus*, nulli *negabimus* aut *differemus* justitiam vel rectum."

We here have in epitome the elements of the free British Constitution, which was more fully developed and declared after that long struggle with the Tudors and the Stuarts, in the Habeas Corpus Act of Charles II., and the Bill of Rights of William and Mary, one of the crowning acts of the Revolution of 1688. We have, in fact, in this clause of the charter the germinal principle of a process of Habeas Corpus, which is, after all, but the declaration of an original principle of the English common law; and we have, moreover, what I apprehend is the first public authoritative recognition of the right of trial by jury.

It is singular how little is known of the first introduction of trial by jury into the proceedings of the English courts. Barrington, a writer upon the early English statutes, quotes what he regards as very high authority, showing that it was unknown to the Saxons, and he favors the idea that it was introduced into England about the time of Henry II.—(*Bar. Stat.* 21, 22.)

Be that as it may, from that day trial by jury has been deemed one of the great safeguards of English liberties, and one of the last to be surrendered. So long as a man's life, property and liberty cannot be taken from him, in the words of this charter, "nisi per legale judicium parsium suorum vel per lege terræ," he may feel that he is under the guardianship and protection of the whole body politic, and in the vigilance of the law has the surest safeguard which human invention has ever devised.

In the closing language of the chapter which I have cited above, we have, in view of the history and condition of the times, one of the noblest declarations in the history of jurisprudence. Made at a time when justice was openly hastened or delayed for money, or withheld in obedience to the dictates of royal power, and which state of things continued to a greater or less degree down to the English revolution, it did but anticipate, by centuries, that advance of the nation and the race, to which they have attained in the progress of civilization and refinement. The words "nulli vendemus, nulli negabimus aut differemus justitiam vel rectum," were adopted by our own Supreme Court as the motto of the seal of that court; and the fidelity with which they have regarded it, in the exercise of their high functions, while impressing it, legibly, upon the processes which they issued, can hardly fail to make one conscious, as he reflects upon a fact so suggestive, of the undying force and dignity of that noble declaration, when a thought, thus elicited by the hardy and unlettered vassals of a weak and contemptible monarch, of then more than half barbarous England, should stand out, as it were in relief, in the proceedings of a court of common law jurisdiction of the highest dignity, administering justice to a million and a half of intelligent freemen, speaking the language of England, in a land of whose local existence even the wisest men of that day had never dreamed, it is but another illustration of the undying nature of noble thought, when clothed in a language of fitting and becoming dignity.

The circumstances under which Magna Charta was granted are in many respects widely variant from any under which we can conceive that Americans can be called upon to

act; but the lesson taught by an examination into the origin and character of this remarkable instrument, can never be too carefully learned, too well remembered, or too faithfully carried out, when it is desired to secure the protection of a numerous, but individually less powerfull class, against the tyranny of active, influential, and unscrupulous superiors. —*Law Reporter.*

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## QUALITIES OF JUDICIAL EXCELLENCE.

Certainly no country can furnish more illustrious examples of judicial excellence than Great Britain. The modern names of Lord St. Leonards, Lord Campbell and Sir Alexander Cockburn have nearly rivaled, in profound knowledge of English law, and grave and impressive discussion of topics presented, those of Lord Eldon and Holt, or the accomplished Mansfield, of a former generation. The qualities which make an excellent judge in Great Britian are not much different, we suppose, from those which make our American judges so generally acceptable to the Bar and to the public. Some reflections in a late issue of the London *Times*, upon reviewing Mr. Foss's History of the Series of Judicial Personages who have adorned the English Bench, are interesting for their novelty, and instructive for the soundness of the sentiments expressed.

In every generation the Judges of England have had some members of patrician birth, but by far the more numerous have risen from the middle classes, and not a few from a humbler station. We think our readers will thank us for quoting a few passages, tending to show the qualities which seem to distinguish English Judges of eminence, and mark their path to illustrious places in the history of jurisprudence.

Professional eminence—success at the Bar of some description—has been the ground for judicial promotion in an overwhelming majority of instances. A few men have been elevated to the Bench by favor, corruption, intrigue, or caprice; and some judicial appointments have been made to recompense somewhat questionable merit. These cases, however are quite exceptions; and, speaking generally, the judicial office has been fairly and honorably won by a long career of forensic distinction. It is evident that the absence of exclusiveness in the ranks of those who are to become our Judges and the principle which has regulated their selection are strong proofs of the dignity and importance which Englishmen during many generations have attributed to the administration of justice, and of the jealous care they have taken to secure that it shall be pure and efficient.

Nearly all of the most illustrious of the series were men who, with knowledge of law, combined literary and scientific accomplishments, and were versed in many branches of learning; Chief Justice Hale was no mean historian; Chief Justice Vaughan was an eminent civilian; the splendid and fruitful intellect of Somers pursued many intellectual objects; Lord Mansfield was an exquisite scholar and a writer of the very highest merit; and it is not necessary to remind the reader of Lord Brougham's many and remarkable attainments. On the other hand, the few persons who have become really distinguished Judges with mere professional and technical acquirements have invariably shown, in different ways, the consequences of their inferior education. Though a great master of English law, Lord Macclesfield was so coarse and illiterate that, in the words of one of his cotemporaries, he "remained to the last a vulgar attorney."

The judicial genius of Lord Hardwicke would have been more brilliant had it received some lustre from the glory of letters, and his influence in the House of Lords, and especially in the society of the world, was impaired by his plebeian manner. It has been alleged that Lord Eldon's practice of never reading anything but law had much to do with his verbose style and the slovenly uncouthness of his judgments, and indeed, it would be difficult to suppose that, had he possessed his brother's scholarship, he would have been so completely deficient in all that relates to expression and method. The same distinction will be found to run more or less throughout the entire series; the men of high education and culture have usually shown a marked superiority over those of mere professional attainments. This is a truth that should be remembered by those who are about to enter the race of the Bar; while it is yet time they should take care to lay in a store of various learning, and to discipline themselves by intellectual training, before their engrossing professional work shall confine them within its narrow limits.

Again, this judicial list gives us much information as to the kind of qualities which have usually raised their possessors to the Bench, and suggests thereby some valuable inferences. Looking over the series of names generally, we shall find that practical acuteness and energy have been in the vast majority of instances the passports to judicial promotion and that the thoughtful and philosophical intellect has been usually distanced in the race, unless, indeed, it has been associated with the other conditions requried for distinction. The most of our Judges have been men completely versed in the business of the courts, with a thorough knowledge of case law within a limited range of subjects, and wonderfully dexterous in points of practice; or they have been eminent advocates at the Bar, or otherwise skilled in conducting causes. But they have shown for the most part little aptitude for jurisprudence, for international law, or even for English law as a system; or, finding these studies in low esteem, they have devoted themselves to those parts of

their calling which secured them the highest advantages, and were the most congenial to their nature.—*N. Y. Transcript.*

## LAW *v.* EQUITY.

*Stewart* v. *The Great Western Railway Co. and Saunders*, 13 W. R. 886.

The development of a legal system appears to be attended with symptoms similar to those which accompany the progress of political development. The archaic type of government is patriarchal, such as we find it in the earliest portion of the Old Testament, and the government of all unsettled tribes is still largely imbued with this character. Every extant record, however, of the rise, progress, and fall of nations, testifies that, when a tribe first quits its romantic life, and becomes a nation, the elements of power become concentrated either in a military aristocracy or a successful general: if the former, the policy assumes a feudal, if the latter, a despotic type. And according to the predominance of one or other of these forms, which are found in conflict with one another in the early life of every nation, is the course thenceforth taken by that nation's history.

Feudalism is the essence of decentralization, despotism is the perfection of centralization, and as power ever tends to beget favour, it follows, of necessary consequence, that to whichever of these forces chances or skill shall give the predominance, that one will gradually but surely, unless stopped by force from without, assume indisputable, and at length undisputed, sway; ending in the one case, in disintegration, in the other, in rigid fixity of rule.

Take the history of ancient Rome as an instance. Whatever may be the truth underlying those mythic records of early kings which our unsuspecting boyhood once devoured without suspicion, this much at least may be assumed, that the original government of the villages, &c., which afterwards coalesced to form the city of Rome, was of the pure patriarchal type; the original senate consisted literally of the "fathers of families," and the original sovereigns were obviously but military leaders of the tribes.

This patriarchal element continued till a late period in the *Comitia Curiata*, which were at first the preponderating power of the state, but which gradually gave way under the centralizing influences to which the peculiar position of the state during the republic lent abnormal strength.

The vast mass of citizens who, not being enrolled in the old guilds, had no part in the *Comitia Curiata*, but who, by the gradual accretion of wealth and numbers came in time to wield the principal power of the state as members of the *Comitia Centuriata*, for a time averted this course; but when, after the success of the Licinian reforms, the whole mass of citizens were admitted to equal civic privileges, the position of the city as the mistress of a large conquered and subject territory led naturally to a policy somewhat like that of Athens; a policy of great freedom for the citizens *inter se*, the most centralized despotism as between the city and her dependant states.

How this centralization grew, by the increase of power in the tribes, into military despotism, we need not here discuss, that seems to be the only condition of political rest; the organization towards which, while it affords no hope of change in itself, all others seem more or less rapidly to gravitate. It is as it were the centre of force of the political universe, round which all systems of government revolve in spiral orbits, which must, after a greater or less number of revolutions, according to circumstances, lead at last to absorbtion in the centre.

May the day be long delayed.

The progress of law as a system closely resembles this. Some ultimate truths or rules are accepted at first, and are sufficient for the simple transactions of a semi-civilized tribe, and enforced by the spontaneous action of the executive government. These may be considered as the patriarchal laws. These general rules, however, are soon found to be inadequate, even for all the cases which they were designed to meet, much more for the ever-varying circumstances of civilized life, and thereupon discretionary, equitable, or Prætorian courts are originated, in which the judge interferes, in accordance, indeed, or presumed accordance, with the principles of the common law, to "mitigate the rigour," of its rules. This is the first great step towards centralization. Henceforward the supreme tribunal of the country, that which practically controls all the others, be it presided over by Prætor, Pro-Consul, Maire de Palais, or Lord High Chancellor, becomes a central power, forcing into harmony with its dictates all the independent actions of the old common law authorities. But this tribunal, at first, *ipsâ naturâ rei*, an arbitrary "court of conscience," gradually becomes systematized. "That which has been shall be," and accordingly precedents, consistently followed, become the law of the court, and it gradually comes to be supposed co-extensive with all possible important questions, and the discretionary extension of the action of the court thereupon ceases. Precedents, however, being merely concrete rules, must, in order to be made thoroughly available, be endued with an abstract or general form. This is done at first by the action of the judges themselves, who, by comparing and classifying the cases cited before them, deduce therefrom certain abstract rules or "principles," which they declare to have been the guiding rule in the class of precedents adverted to, and then the precedents themselves come to be neglected, and the rule thus enunciated is accepted as an suitable "maxim."

But by and bye a fresh central power steps in, which, in every civilized state, is sure to absorb all authority into itself—the Legislature. Whether the legislative power be representative, or feudal, or despotic, or a combination of all three, or of any two of them, it is equally certain that it will, as the nation passes towards complete organization, become more and more rapidly the only active power in the commonwealth, so that the courts, ceasing to mould old rules, or make new ones, become, in time, machines for registering statutory decrees. When this stage is arrived at, the nation has reached legislative despotism; the legal planet has plunged into its centre of force, and a fixity of state—may it not prove to be the blackness of darkness—thenceforth remains for it. Then, and not till then, may judges be heard to refuse to do justice because an Act of Parliament is too strong for them; then, and not till then, to implore legislative assistance to help them out of difficulties arising from anomalies in the law.

With all its drawbacks, however, this state has one great advantage. It is pre-eminently the age of simplification. The Legislature may, and ordinarily does in such case, interfere unnecessarily and perniciously with the action of the settled law, and many "novels," not always beneficial, may be expected as the result; but the same authority which issues the "novels," delights in "pandects," and an age of codes and digests naturally succeeds the era of legal fictions and Prætorian edicts.

Thus the legal system, like the body politic, becomes in its old age, as in its youth, subject to arbitrary rules, admitting neither of variation nor evasion.

(*To be continued.*)

## PLEADING A CONTRACT.

In an action founded upon a contract, such contract should be stated truly, with all its conditions (*Adam* v. *Mayor* of N. Y., 4 Duer, 295) and qualifications (*Metzner* v. *Bolton*, 9 Exch. 518; *Brown* v. *Knill*, 2 Brod. & B. 895) though unintentional defects of statements are not attended with such serious consequences as was formerly the case.

An express contract may be set forth in its precise words (*Fairbanks* v. *Bloomfield*, 2 Duer, 353; *Moore* v. *Plymouth*, 3 Barn. & Ald. 69; *Newborough* v. *Schroder*, 7 C. B. 897) or according to its substantial effect (*Clarke* v. *Morrell*, 1 Man. & Gr., 841.) It is not necessary, now, to state a contract strictly according to its legal effect, nor indeed is it allowable to plead the legal effect of an agreement, if it is not consistent with the literal truth (*Gasper* v. *Adams*, 28 Barb., 441.)

Where a contract contains several distinct covenants, it is unnecessary to state more than the one upon which the action is brought, and such as qualify it (*Williams* v. *Healey*, 3 Denio, 363; *Sanford* v. *Halsey*; 2 Denio, 253, 255; *Scott* v. *Lieber*, 2 Wend. 479; *Henry* v. *Cleland*, 14 Johns. 400; see *Hood* v. *Inman*, 4 Johns. Ch. 437; *Handford* v. *Palmer*, 2 Brod. & B. 359.)

If a contract has been modified, it must be pleaded as modified (*Baldwin* v. *Munn*, 2 Wend. 399; *Langworthy* v. *Smith*, id. 587; *Freeman* v. *Adams*, 9 Johns. 115; *Philips* v. *Rose*, 8 id. 392); and, if a new agreement is substituted, that must be pleaded (see *Spencer* v. *Halstead*, 1 Denio, 606) and that alone (*Chesbrough* v. *New York and Erie Railroad Company*, sp. t., 26 Barb. 9; 13 How. 557.) A mere extension of time for performance is not, however, a modification essential to be pleaded, if constituting no part of the cause of action (*Crane* v. *Maynard*, 12 Wend. 408.)

In an action upon a contract implied by law, the facts from which the law implies such a contract must be alleged (*Prentice* v. *Dyke*, 6 Duer, 220) though the implied contract itself need not and should not be expressly pleaded (*Farron* v. *Sherwood*, 17 N. Y. 227; *Jordan & Sken P. R. Co.* v. *Morley*, 23 id. 552.)

Except in the cases hereafter noted, every complaint upon a contract, whether implied or express, oral or written, must aver the existence of a consideration for the contract (*Dolcher* v. *Fry*, 37 Barb. 152; *Spear* v. *Downing*, 12 Abb. 437; 22 How. 30; 34 Barb. 522; *Bailey* v *Freeman*, 4 Johns. 280; *Burnet* v. *Bisco*, id. 235; to same effect *Seaman* v. *Seaman*, 12 Wend. 381; *Parker* v. *Crane*, 6 id. 647; and see *Prindle* v. *Caruthers*, 15 N. Y. 430.) And the consideration, as pleaded, must be sufficient to sustain the contract (*Ross* v. *Sadgbeer*, 21 Wend. 166.)

Where the nature of the contract alleged is such as to raise a presumption of a consideration, none need be averred. Thus, no consideration need be stated in pleading a contract under seal (*Bush* v. *Stevens*, 24 Wend. 256) or a negotiable bill or note (*Tibbetts* v. *Blood*, 21 Barb. 650; see *Bank of Troy* v. *Topping*, 9 Wend. 277; *Goshen Turnpike Co.* v. *Hurtin*, 9 Johns. 217; *Halch* v. *Trayes*, 11 Ad. & El. 708; *Combs* v. *Ingram*, 4 Dowl. & Ryl. 214.)

The consideration should of course be stated with substantial truth, but the strict rules of the Common Law, which required the whole consideration to be stated, and to be proved as laid, without regard to the importance of the omission or variance, are not applicable under the Code.

If the action is brought upon a written contract, signed by the defendant, containing an acknowledgment of consideration, and a copy thereof is set out in the complaint, that is a sufficient averment of consideration (*Prindle* v. *Caruthers*, 15 N. Y. 425.)

An executed consideration—that is, one which had been rendered before the promise sued upon was made—must be alleged to have been rendered at the defendant's request (*Spear* v. *Downing*, 35 Barb. 522; 12 Abb.

437; 22 How. 30; *Parker* v. *Crane*, 6 Wend. 647; *Chaffee* v. *Thomas*, 7 Cow. 358; *Comstock* v. *Smith*, 7 Johns. 87; *Livingston* v. *Rogers*, 1 Cai. 583) unless it is made apparent that such consideration was not given nor accepted as a mere gratuity, in which case the averment of request may be omitted (note to *Fisher* v. *Pyne*, 1 Man. & Gr. 266; see *Victors* v. *Davis*, 12 Mees. & W. 760; *Doty* v. *Wilson*, 14 Johns. 378; *Hicks* v. *Burhaus*, 10 id. 243.) Thus, in an action for goods "sold" (*Acome* v. *American Mineral Co.*, sp. t., 11 How. 24) or money "lent" (*Victors* v. *Davis*, 12 Mees. & W. 760) it is not necessary to allege that the sale or loan was made at the defendant's request. And a subsequent adoption or ratification of an act done in the expectation of reimbursement is equivalent to a previous request (*Doty* v. *Wilson*, 14 Johns. 378.)

When the only consideration alleged for a promise on the part of the defendant is a promise by the plaintiff, it must appear that they were made simultaneously (*Livingston* v. *Rogers*, 1 Cai. 583; see *Keep* v. *Goodrich*, 12 Johns. 397.)—*N. Y. Transcript.*

## UPPER CANADA REPORTS.

### QUEEN'S BENCH.

(*Reported by* C. Robinson, Esq., Q.C., *Reporter to the Court.*)

### Ball v. Sprung.

*Appeal from county court—Verdict entered on motion, without leave reserved—Practice.*

A rule *nisi* to enter a verdict for the plaintiff, or for a new trial, was made absolute in the county court in the first alternative, although defendant had not assented to any leave being reserved to move. On appeal, this court directed the rule absolute to be discharged, leaving it to the court below to dispose of the application for new trial, the other alternative of the rule *nisi*.

[Q. B., E. T., 1865.]

Appeal from the County Court of Huron and Bruce.

This was an action for converting goods, and on the common counts.

At the trial in court below the jury found a verdict for defendant, but they were requested to assess the damages sustained by the plaintiff in case he should be entitled to succeed, and they settled this amount at $30.

Leave was reserved to the plaintiff to move to enter a verdict in his favor for this sum, the defendant not assenting to the reservation, although the learned judge was at the time under the impression that it was not objected to; and a rule *nisi* obtained in pursuance of such leave, or for a new trial, was made absolute to enter the verdict accordingly.

The defendant thereupon appealed.

*O'Connor*, for the appellant.

*S. Richards*, Q. C., contra.

Draper, C. J., delivered the judgment of the court

The amending act, 27 Vic., ch. 14, sec 2, seems to extend to the question brought before us, as the rule on which the judge has given his decision was upon leave reserved to move to enter a verdict for the plaintiff. Otherwise there would apparently be no appeal, under Consol. Stats. U C., ch. 15, sec. 67.

There could be no doubt that the learned judge had no authority to reserve any such leave to the plaintiff without consent of the defendant, which consent, it now appears, was not given. The rule absolute to enter a verdict for the plaintiff, in lieu of that given for the defendant by the jury, cannot be upheld, and we must order and direct that such rule absolute be discharged, without costs, however, under the circumstances.

The rule *nisi*, however, contained two alternatives; one to enter a verdict for the plaintiff, the other for a new trial This latter alternative has not been decided upon, nor indeed could it, for the former part being granted rendered it impossible to grant the latter. As in our judgment the decision given must be annulled, the question presented by the latter alternative necessarily arises, or the verdict for the defendant must stand. No decision has been given upon this in the court below, and the reversal of the decision given has not proceeded upon the merits, which we declined to hear, as there was a clear want of authority. We cannot therefore decide on appeal when the court below has not decided anything as to the question of new trial, and we must leave the case to the jurisdiction of the County Court judge, subject to the decision above given, in order that the latter alternative of the rule may be disposed of by him.

Appeal allowed.

### Taylor v. Rose et al.

*Nonsuit—Right to move against—Practice.*

Action upon a promissory note. Plea, fraud and want of consideration. At the end of the charge, in which the judge had expressed an opinion that there was some evidence to support the plea, the plaintiff's counsel desired him to charge in a particular way, and upon his declining to do so took a nonsuit. *Held*, (affirming the judgment of the County Court,) that having thus elected to be nonsuited, the plaintiff could not move against it.

[Q. B., E. T., 1865.]

Appeal from the County Court of the County of Wellington.

The action was brought by the plaintiff as indorsee of a promissory note made by the defendants.

The declaration contained only one count on the note, to which there was only one plea—that the defendants were induced to sign the note through fraud, &c., on the part of the payee, and without consideration, and that the plaintiff received the note with knowledge of the premises, and without consideration.

At the trial the defendants called witnesses to support their plea. The case closed without any objection; but at the end of the learned judge's charge to the jury, in which he had expressed his opinion that there was evidence to go to them in proof of the defendant's plea, the plaintiff's counsel desired the learned judge to charge in a particular way, and upon his declining to do so took a nonsuit.

In the following term the plaintiff obtained a rule *nisi* to set aside the nonsuit and for a new trial. The first ground stated in the rule was, that the plaintiff consented to be nonsuited out

of deference to the opinion of the judge. The other ground referred to the want of proof to support the defendants' plea.

Upon the argument of the rule it was objected that the plaintiff having voluntarily elected to take the nonsuit, he was not in a position to have it set aside. The learned judge sustained the objection, and upon that ground refused to set aside the nonsuit, and discharged the rule *nisi*. Against that decision this appeal was brought.

*Robert A. Harrison*, for the appellant.

*S. Richards*, Q. C., contra, cited *Stuart* v. *Bullen*, 1 U. C. Q. B. 451; *McGrath* v. *Cox*, 3 U. C. Q B. 332; *Vacher* v. *Cocks*, 1 B. & Ad. 145; *Simpson* v. *Clayton*, 2 Bing. N. C. 467; *Wood* v. *Bowden*, 23 U. C. Q. B. 466.

Morrison, J.—Upon the trial of the cause no motion was made for a nonsuit, nor did the learned judge suggest or direct a nonsuit or a verdict for defendants. The rule *nisi* was not moved for on the ground of misdirection, or the reception of improper evidence, or the rejection of evidence.

The case of *Simpson* v. *Clayton*, 2 Bing. N. C. 470, is very like this case. There *Park, J.*, in charging the jury, intimated a strong opinion on the evidence unfavorable to the plaintiff, and the plaintiff's counsel interposing without effect to obtain a direction in his favour, elected to be nonsuited. The nonsuit was moved against, and it was contended that it was a case of respectful acquiescence in the opinion of the judge, and not a case of election. *Tindal*, C. J., in discharging the rule says "The general rule is, that when in the progress of a trial the counsel for the plaintiff withdraws the question of fact from the consideration of the jury, and submits to a nonsuit, he cannot afterwards move to set aside a result of the cause which has been occasioned by his own act. * * One exception is, that if the learned judge who presides expresses a strong opinion that there should be a nonsuit, or gives a jury a wrong direction, and the counsel for the plaintiff yields for the time in deference to the judge, the Court will afterwards deal out to the plaintiff the same measure of justice as if the cause had gone on to an uninterrupted conclusion. That was the case of *Alexander* v. *Baker*, 2 Cr. & J. 133. "So far is that from being the case here, upon either of the particulars to which I have referred, that the learned judge never directed a nonsuit, but was proceeding in his summing up when the counsel for the plaintiff, after one interruption, desired to be nonsuited rather than allow the case to go to the jury. That course therefore was the voluntary election of the plaintiff's counsel. I have heard of no wrong direction, nor of any evidence having been improperly rejected, but only that the learned judge from time to time expressed an opinion on the evidence, as he was bound to do."

I also refer to *Austin* v. *Evans*, 2 M. & G. 430. *Wilkinson* v. *Whalley*, 5 M. & G. 590, and to *Magrath* v. *Cox*, 3 U. C. Q. B. 332, where Sir *James Macaulay* reviews all the cases. In *Wilkinson* v. *Whalley* it was conceded that where a plaintiff elected to be nonsuited in consequence of misdirection as to the weight and effect of the evidence, he could not move to set aside the nonsuit; but it was submitted that a plaintiff might do so where the misdirection was as to the law. And *Cresswell*, J.; in his judgment said, "I wish to add one word as to setting aside nonsuits. The doctrine has perhaps been carried a little too far. I do not accede to the rule, in its broad terms, that whenever a judge misdirects the jury upon a point of law, and the plaintiff thereupon *elects* to be nonsuited, he can afterwards move to set aside the nonsuit."—See also Baron Wood's judgment in *Ward* v. *Mason*, 9 Price, 291.

Upon the strength of these authorities, I am of opinion that the judgment of the court below upon this point was correct, and that the appeal should not be allowed.

Upon the other points raised in the court below, and referred to in the argument, it is unnecessary to express any opinion. The question arising upon the construction and effect of the 26 Vic., ch. 45, is one of great importance, and by no means free from doubt. I am authorised to say that my brother Hagarty, who heard the argument, concurs in this judgment.

Draper, C. J., concurred.

Appeal dismissed with costs.

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## Gamble v. The Great Western Railway Company.

*Railway—Liability for loss of luggage.*

Plaintiff, travelling on a first-class passenger ticket on defendant's railway, from Chatham to Toronto, had a travelling bag, which he took with him into the car, not having offered it to be checked, nor having been asked to do so, or to give it in charge to any of defendants' servants. At the London station, where the train stopped for refreshments, he left it on his seat in the car, in order to retain the place, and on his return from the refreshment room it was gone.

*Held*, that defendants were liable for the loss.

*Morrison*, J., dissented, on the ground that, under the system of checking luggage adopted in this country, defendants' liability should be confined to articles checked.

*Per Draper*, C. J.—That system should be considered as an additional precaution adopted by the defendants for their own security, not as affecting their liability.

[Q. B., E. T., 1865.]

This was a case stated for the opinion of the court, under the C. L. P. A., as follows:—

The defendants are common carriers, for the carriage of passengers, luggage and goods.

In the month of October last the plaintiff was a passenger on the railway of the defendants, having purchased at their station, in the town of Chatham, a first-class passenger ticket, which entitled him and his luggage to be carried from Chatham to Toronto, but the defendants not thereby assuming a higher responsibility in respect of such luggage than attaches to carriers of passengers having luggage with them—meaning to distinguish such responsibility, if it exists in law, from the responsibility of common carriers for goods.

The plaintiff had with him, amongst other luggage, an enamelled travelling bag, containing the usual articles of a dressing-case, wearing apparel, and other effects of the plaintiff, of the value of twenty pounds.

All these articles of luggage were taken by the plaintiff into the passenger car in which he took a seat for the journey he was about to make. He did not offer the travelling bag to the porters of the defendants to be checked. No servant of

the defendants presented himself to take charge of the same, nor was any notice given that defendants required the same to be checked.

At the London station of the defendants the train stopped for a short time to enable passengers to obtain refreshments, and the plaintiff, as is usual with passengers, in order to retain their seats, placed the travelling bag in the seat where he had been sitting, and went out to the refreshment room. Upon the plaintiff returning shortly afterwards to his seat in the car, the travelling bag, but no other portion of the plaintiff's luggage, was missing, and has not since been found, although the plaintiff forthwith reported the loss to the conductor of the train, and also to the station master at the London station.

The question for the opinion of the court is whether, under the facts above stated, the defendants are liable for the loss of the travelling bag.

If the court be of opinion that the defendants are liable, then judgment to be entered for the plaintiff for twenty pounds and costs of suit.

But if the court shall be of opinion that the defendants are not liable, then judgment of nonsuit to be entered against the plaintiff, with costs of suit.

*G. D'Arcy Boulton* for the plaintiff, cited *Richards* v. *The London, Brighton, and South Coast Railway Co.*, 7 C. B 839; *Butcher* v. *The London and South Western Railway Company*, 16 C. B. 13; *The Great Northern Railway Company* v. *Shepherd*, 8 Ex. 80; *Shaw* v. *The Grand Trunk Railway Company*, 7 U.C C.P. 493. (Hagarty, J., referred to *Stewart* v. *London and North Western Railway Co*, 10 L. T. Rep. N S 302.)

*Irving*, Q. C., contra, cited Powell on Carriers, 2d Edn. 42, 56; Chitty and Temple on Carriers, 285, 289; *Towers* v. *The Utica and Schenectady R. W. Co.*, 7 Hill 47; *Great Western R. W.* v. *Goodman*, 12 C. B. 813.

Draper, C. J., read the following judgment, prepared by Hagarty, J.—The case states that defendants are common carriers of passengers, luggage and goods, and plaintiff purchased a ticket which entitled him to be carried with his luggage from Chatham to Toronto, but the defendants (as the case states) did not thereby assume a higher responsibility in respect of such luggage than attaches to carriers of passengers having luggage with them—meaning to distinguish such responsibility, if it exist in law, from the responsibility of common carriers of goods.

The plaintiff had with him a travelling bag, containing ordinary articles for a traveller's personal use, and placed it on the seat beside him, not offering it to be checked, nor being asked to have it checked as baggage, nor any notice that it should be checked being given to him. He left the carriage for a few minutes at a refreshment station, and on his return to his seat the bag was missing, and has not since been found.

The case is stated without pleadings, and no question is raised as to their being any thing unusual or against the defendants' rules or practice in the plaintiff or any other passenger placing an article like a travelling bag beside him in the carriage. He was entitled under the contract of carriage to be carried from Chatham to Toronto by defendants, *with his luggage*, of which the bag was a part.

It is not easy to understand how, on such a state of facts, the defendants, as carriers, are not responsible for the safe carriage of this passenger's luggage. There is no suggestion of any personal neglect or violation of any known rule or course of dealing on the plaintiff's part. He was received by defendants in their train in the ordinary way. His bag is placed near him, as far as we are told, not in any improper or unusual place. During the transit he leaves the train, with other passengers, for refreshments, in a manner permitted or at least not objected to by defendants, and on returning to his seat his bag is missing. We cannot see how defendants can escape liability.

In *Richards* v. *The London, Brighton, and South Coast Railway Co.*, 7 C. B. 839, the plaintiff came to the train in a cab, and the driver, without any communicaiton with defendants' servants, placed her dressing-case under her seat in the carriage; her other luggage was taken and weighed by the defendants' porters. On arrival the porters carried her luggage, consisting of many articles, from the carriage to a coach, telling her servant that they would see to her things. On reaching her residence it was, for the first time, discovered that the dressing-case was lost. The defendants insisted that this article had never come into their custody. The jury found that they had received it to be carried.

The court held the defendants liable Wilde, C. J., (a judge peculiarily well versed in all such common law questions) adds "The fact of the dressing-case being placed under the seat of the carriage, and so under the more immediate control and inspection of the passenger, in my opinion, makes no difference." Creswell, J., says, "There was abundant evidence to shew that the dressing-case in question came into defendants' custody under such circumstances as to make them responsible for its safe conveyance and delivery." Williams, J., says, "It was in their custody as common carriers at the time of the loss."

Much of the contention of defendants was that the transit was at an end before the loss, and that, as the dressing-case was lost between the train and the hackney coach to which the plaintiff's luggage was carried, they were not responsible.

In *Stewart* v. *The London and North Western Railway Co.*, 10 L. T. Rep. N. S. 302, this last case is spoken of by Bramwell, B., who says, "I was counsel in that case, and certainly thought it a hard one upon the company; but, assuming that case to be law, it is not this case." It was contended that defendants, as to passenger's baggage, had all the responsibilities of common carriers of goods, and Story's opinion to that effect is cited—Story on Bailments' sec. 499. Pollock, C. B., says, "By the case of *Richards* v. *The London and Brighton Railway*, I am not convinced to the contrary; and notwithstanding the eminence of Story as an authority, and his learning and ability, I do not think the luggage of passengers by railway is to be treated as goods which are usually and ordinarily sent as 'goods'"

It must be noted that this latter case was one in which it was proved that the plaintiff took a ticket at a reduced rate by an excursion train,

one term of the contract being that his luggage was at his own risk.

In *Shepherd* v. *Great Northern Railway Company*, 8 Ex. 30, the plaintiff put a carpet bag beside him under the seat, containing a large quantity of merchandise. The court held that defendants were bound to carry the plaintiff and his luggage, and that he could not recover for the loss of merchandise. For a few things in the bag, shewn to be "luggage," he was allowed to recover. "The defendants," (says Parke, B.,) "only agreed for the stipulated fare to carry passengers and every thing which constituted personal luggage."

In *Butcher* v. *The London and South Western Railway Co*, 16 C. B. 13, the plaintiff took his carpet bag into the carriage and placed it on the seat by him. Besides wearing appearel it containing £400. On arrival he alighted with it in his hand. A servant of defendants took it from him, and guided him to a cab inside defendants' station, and placed the bag on the foot-board. Plaintiff returned to the train for his wife. When he came back the cab and bag had disappeared. Defendants contended that they had never received the bag to be carried, besides contesting their liability for its loss at the terminus. The court held defendants liable. Cresswell, J., says, "There was *primâ facie* evidence of the delivery of the bag to the company to be carried." The whole contest was as to the loss at the terminus.

In *Cahill* v. *The London and North Western Railway Co.*, 4 L. T. Rep., N. S. 246, the defendants were held not responsible for the loss of merchandise delivered to them by a passenger as his personal luggage. Erle, C. J, says, "The contract by a passenger taking a ticket to be carried with his luggage, is a contract creating a duty in the railway company to carry safely that which he passes to them as personal luggage, but not that which is in reality not personal luggage, not ordinary luggage, but merchandise. Willes, J., says, "The fair conclusion is—and that appears to have been the view laid down by Story, J.; I believe also entertained by Lord Wensleydale; it appears to me to be rather a conclusion of fact than of law; that a ticket so taken gives the passenger a right to have himself and his ordinary personal luggage carried for the payment which he makes."

*The Belfast &c. Railway Co.* v. *Keys*, 4 L. T. Rep., N. S. 841, in the House of Lords, turned on the same difficulty. The plaintiff, as Lord Westbury says, "intended to carry as personal baggage that which he was bound in ordinary fairness to have stated and paid for as merchandise." The company admitted that under his ticket he and his personal luggage was to be carried by them. Lord Wensleydale says "The original contract certainly was that the plaintiff was not to pay anything for his luggage, but he was bound to pay for merchandise," &c., &c. *Shaw* v. *The Grand Trunk Railway Co.*, 7 U.C. C.P. 498, turns on the same distinction between luggage and merchandise, and follows the *Great Northern Railway* v. *Shepherd*, already referred to, and emphatically recognises the liability to take care of passengers' luggage, quoting with approval Angell on Carriers, sec. 115:—"An aggreement to carry ordinary baggage may well be implied from the ordinary course of business," &c.

The case before us is free from any of the difficulties presented in some of those cited. I entertain no doubt of liability for the loss of the plaintiff's personal luggage, under the circumstances stated in the case. If defendants ordinarily permit passengers to take articles of luggage into the carriage with them, making no objection, and not requiring them to surrender it into their servants' special charge, it is not easy to see why they should not be responsible.

Draper, C. J.—The judgment which I have just read was prepared by my brother Hagarty under the impression that it would express the unanimous opinion of the court. I concur in the conclusion at which he has arrived, but my brother Morrison, I believe, dissents, for reasons which he will give and I desire, therefore, to add a few words.

The law of common carriers, either by railway or otherwise, I take to be the same here as in England, and therefore, if it be determined there in any particular case that a contract is implied, the same contract will arise here, unless some special condition has been introduced by the company for their own protection. In this case there is a reference to the system of checking, which prevails here with regard to luggage carried on railways, but not in England. I have considered whether the existence of this practice should make any difference, and my conclusion is that it must be regarded as introduced by the company for their own benefit, not for that of passengers. If the law be the same in both countries, and makes the company liable for passengers' luggage, as I take it to do, then I do not see how the responsibility can be altered by any difference in the system which they may choose to adopt for the care and management of it. In England the luggage is often carried on the tops of the various cars, and in no way identified with its owner but by marking upon it the destination. Here there is usually a baggage-car on which the company require all baggage to be placed which is not carried by hand; and in addition to that there is a system of checks, one check being attached to the luggage, and another, with a corresponding number upon it, given to the owner, which must be produced on claiming the property. These, I think, are to be considered only as additional precautions taken by the company, beyond what is customary in England, in order to prevent the luggage from being given up to the wrong person. They would be liable for a loss, in case no such means had been taken, and if, notwithstanding, a loss occurs, I do not think their liability is changed, in the absence of express notice on their part that they will be responsible only for articles checked.

This being so, I think the case cited by my brother Hagarty, from 7 C. B. 839, is conclusive, and it is as strong a case in its circumstances as could well be conceived. There it did not appear that any of the company's servants had the least notice of any such thing as was lost being on the train, and the loss was not observed until the plaintiff had entered a hack, another mode of conveyance, and driven two or three miles from the station. The company were held liable; and though Baron Bramwell, in *Stewart* v. *London and N. W. Railway*, remarked that it was a hard

case upon the defendants, I am not aware that the decisions has ever been impunged.

Morrison, J.—I regret that I am unable to concur in the judgments just given. The system of checking luggage, and the appropriation of a particular car for it, the construction of the passenger carriages and the passing to and fro of passengers in them at their pleasure, so entirely differs from the system and customs prevailing in England, that I cannot avoid keeping those differences in view in applying the law and principles laid down in the English cases. Here the passenger frequently takes into the carriage with him portions of his luggage, for his personal use and convenience during the journey, retaining it entirely under his own control, and removing it from time to time from one car or seat to another. As to the system of checking, which is a custom practised upon all our railways, I think it is but a fair construction to put upon it, to consider it as a notice to passengers that all articles of luggage which they do not desire or prefer to keep under their own personal care and at their own risk must be checked or handed to the Company's officers.

In all the cases relied on by the plaintiff, it is important to note that the losses complained of were in some degree caused by the neglect or misconduct, or through the interference of the Company's servants, they having either taken charge of or dealt with the missing articles in one way or another; and although the principles laid down in those cases are apparently broad enough to create liability without such interference, yet the material parts of those decisions rest to a great extent upon the conduct of the Company's officers or servants; and from what was said by Wilde, C. J., in *Richards* v. *London and South Coast Railway Company*, 7 C. B. 859, the question of liability depends upon the particular circumstances, for when referring to the circumstances under which the plaintiff's dressing case was put into the carriage, he says: "No doubt this might have been done under such circumstances as would discharge the carriers, or, more properly speaking, under such circumstances as never to cast upon them the responsibility of carriers. But that would depend upon the evidence."

Now it appears to me upon the facts and circumstances here admitted, and the conclusion to be deduced from them, that the defendants were discharged from responsibility as to the plaintiff's bag. I cannot arrive at any other conclusion than that the bag was under the personal care and charge of the plaintiff, and virtually withdrawn by him from the care and control of the defendants, a view which is supported by the act of the plaintiff at London, using the bag for the purpose of retaining his place in the carriage, by placing it on the seat when going out for refreshments. I am therefore of opinion that a nonsuit should be entered.

Judgment for plaintiff, Morrison, J. dissenting *(a)*.

(a) At the conclusion of this judgment *Boulton*, for the plaintiff, mentioned that in practice the Railway Companies decline to check smaller articles like the bag in question, for fear of injury to them in the baggage-car; and that these defendants had in fact refused to check this bag when asked to do so by the plaintiff on a previous occasion.

## COMMON LAW CHAMBERS.

(*Reported by* Robt. A. Harrison, Esq., *Barrister-at-law.*)

### Dunn v. Dunn.

*Right of official assignee to attach judgment on ground of irregularity—Necessity for prompt application—Amendment of trifling irregularity without costs—Defence on the merits—Attaching judgment on ground of fraud.*

Where final judgment in default of an appearance to a specially indorsed writ was entered on 23rd January, and execution issued on 30th of same month, and a writ of attachment under the Bankruptcy Act issued on 3rd February, an application on 28th March, at the instance of the official assignee, to set aside the judgment as irregular for a defect in the affidavit of service, was held to be too late.

Where an irregularity was of a trifling character, such as the omission to fill in the date of the entry of judgment, an amendment was allowed without costs.

Leave to the official assignee to defend on the merits, which if granted would have had the effect of destroying plaintiff's priority as against the attaching creditors, was refused, and the official assignee left to his remedy if any, in term, as against the judgment on the ground of fraud.

[Chambers, April 10, 1865.]

Defendant's official assignee, on 28th March last, obtained a summons calling on the plaintiff to shew cause why the judgment entered in this cause on the twenty-third day of January last should not be set aside, and the writ of execution issued thereon, and all proceedings had on them, or either of them, for irregularity, on the ground that the affidavit of service of the writ of summons did not sufficiently state the date on which the said writ of summons was served; and also that the date of entering of the said judgment was not stated in the said judgment; and on grounds disclosed in affidavits filed; and also to shew cause why the said judgment should not be set aside for the benefit of William Thomas Mason, the official assignee of the defendant; or the said William Thomas Mason, as such official assignee, be let in to defend the action on the ground that defendant had and there was a good defence to the action upon the merits and upon the grounds disclosed in affidavits and papers filed. And why any monies made by the sheriff under the writ of execution should not be paid over to the official assignee, on grounds disclosed in affidavits and papers filed.

The writ of summons was issued on 11th January; the affidavit of service was sworn on the same day, and deponent swore that he endorsed on the writ on 11th January, within three days after the service, the day of the week and month of such service. The endorsement was, "Served on Monday the 11th day of January, 1865." The affidavit omitted to state the day of service. Final judgment was entered on the 23rd January, and execution on the 30th January.

The writ of attachment was issued against defendant on 3rd February, before the goods were sold.

*T. H. Ince* for plaintiff.

*O'Connor* for official assignee.

The following cases were cited during the argument: *Warrington* v. *Leake*, 22 L. J Ex. 263; *Gould* v. *Whitehead*, 8 Scott, 841; *Cash* v. *Wells*, 1 B. & Ad. 375.

Richards, C. J.—I think the application to set aside the summons too late (even if the affidavit under any circumstances were defective, of which I have strong doubts, supposing the

rights of the official assignees have accrued from 3rd February.

As to the entry of judgment wanting the date, I suppose it is irregular, and that the official assignee has an interest in having the proper date of the judgment placed on it. But as the amendment is of such a trifling character the plaintiff may amend without costs.

As to letting in the official assignee in the name of the defendant to defend on the writs, if the judgment be set aside then the plaintiff will I apprehend lose his priority for the attachment issued before the sale of the goods; and as they are bound by plaintiff's execution, he would in the event of his judgment being sustained, have a right to the proceeds of the sale of the goods.

I do not see my way clear, in the present state of the case, to open the matter and let the official assignee in to defend, as he seeks to do, and, as at present advised, must discharge that portion of the summons. If he can attack the judgment as fraudulent, on making out a clear case, the court in term may set it aside, or if they have doubts may order an issue to inform their conscience before setting it aside, which as a judge in Chambers I cannot do.

Looking at the final result of the application, the plaintiff if he desire it may have an order to amend the roll by inserting the proper day of entering the judgment in it in the regular way; otherwise the defendant may amend the roll and tax the costs of such amendment against the plaintiff.

If the plaintiff elects to amend the rolls he will get the order without costs, and no costs will be allowed to either party.

On the order going to amend the roll to plaintiff, the residue of the application will be discharged, as I have said, without costs to either party.

This decision is without prejudice to the official assignee to set aside the judgment as fraudulent, if advised to do so in term.

Order accordingly.

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## In re Bright.

*Canadian Foreign Enlistment Act, 28 Vic., cap. 2, sec. 1—Sufficiency of warrant of commitment—Statement of offence—Adjudication—Costs.*

*Held* 1. That a commitment under Stat. 28 Vic., cap. 2, sec 1, stating the offence as follows, "for that he on &c., at &c., did attempt to procure A. B to serve in a warlike or military operation in the service of the Government of the United States of America," omitting the words "*as an officer, soldier, sailor, &c.*" was bad.

*Held* 2. That a judgment for too little is as bad as a judgment for too much, and so a condemnation to pay $100 and costs, when the statute creating the offence imposes a penalty of $200 and costs, is bad.

*Held* 3. That a commitment, on a judgment for a penalty and costs, not stating in the body of the commitment or a recital in it, the amount of costs, is bad.

*Quære*, is the jurisdiction of the officers named in 28 Vic., cap. 2, a general or local one?

[Chambers, April 21, 1865.]

This case came before the presiding judge in Chambers, on a return to a writ of *habeas corpus*. The prisoner's presence having been dispensed with at his own request.

The return showed that the prisoner was in custody on four warrants. The first was dated the 28th day of March, 1865, "at Chatham in the county of Kent," and recited that the prisoner was on that day charged before T. M., Esq., "Police Magistrate and one of the Justices of the Peace in and for the said county of Kent," for that he on the 22nd March last, at Chatham, did attempt to procure Thomas Livingood to serve in a warlike or military operation in the service of the Government of the United States of America, for which offence he was on the 28th March convicted "before me the said Police Magistrate, and condemned to pay a penalty of $100, and in default of payment forthwith to be committed to the Common Gaol of the county, until paid," and "that the prisoner has not paid, &c.," and directed him to be taken and conveyed to the gaol—there to be kept until he should pay the said penalty together with the costs of this "comment," or be thence delivered by due course of law.

The second was dated 30th March, 1865, at Chatham in the county of Kent aforesaid. The magistrate was described as in the first warrant, and the offence was set out in terms precisely similar, except that the name John F. Russell is introduced in place of Thomas Livingood. The adjudication was that the prisoner pay a penalty of $100 and costs forthwith, and be imprisoned at hard labor in the Common Gaol for a period of six months, and in default of payment of the penalty and costs, forthwith for such further time as the same remain unpaid—and the committal was at hard labor for a period of six months and for such further time as the said penalty and costs remain unpaid, also the charges of the commitment and conveyance to gaol.

The third was dated the 28th March, 1865, and was like the first, correcting the word "comment" by substituting "commitment," but it ordered the prisoner to be kept "until said fine and costs together with costs of commitment and conveying the said James Bright to the said Common Gaol"—not finishing the sentence but at once proceeding with "Given under my hand &c." In the margin of this warrant is the following memorandum or entry:

| | |
|---|---|
| Fine | $100 00 |
| Information and warrant | 0 50 |
| Hearing case | 0 50 |
| Return of conviction | 1 00 |
| Arrest and attendance by constable | 2 00 |
| 1 Witness | 0 50 |
| Commitment | 0 25 |
| Conveying to gaol | 1 00 |
| | $105 75 |

The fourth was dated 30th March, 1865, and was like the second, but contained a marginal entry or memorandum like that on the third warrant.

*James Paterson*, for the crown.

*John B. Read*, for the prisoner.

Draper, C.J.—The statute 28 Vic., ch. 2, sec. 1, enacts that if any person whatever in this Province shall hire, retain, engage or procure, or shall attempt or endeavour to hire, engage or procure any natural born subject of Her Majesty, person or persons whatever, to enlist or to enter or engage to enlist or to serve or to be employed in any warlike or military operation in the service of or for or under or in aid of any foreign power,

state, potentate, colony, province or part of any province or people, or of any person or persons exercising or assuming to exercise the power of government in or over any foreign country, colony, province or part of a province or people, either as an officer, soldier, sailor or marine, or in any other military or warlike capacity—or (the other definition of offence not bearing on this case) such offender may be prosecuted either in the manner provided in the 59 Geo. 3, ch. 69, (the Foreign Enlistment Act) or in a summary way before (among others) any judge of either of the Superior Courts of Common Law for Upper Canada, or any judge of a County Court, Recorder, Judge of the Sessions of the Peace or Police Magistrate, or before any two justices of the Peace for the district or county where the offence shall have been committed, and if convicted on the oath of one or more credible witness or witnesses, may be condemned to pay a penalty of $200 with costs, and may be committed to the Common Gaol of the district county or city, for a period not exceeding six months at hard labor, and if such penalty and costs be not forthwith paid, then for such further time as the same may remain unpaid; and such penalty shall belong one half to the prosecutor and one half to Her Majesty, for the public uses of the Province.

It is objected,

1. That it does not appear for what place the convicting magistrate is Police Magistrate. Each warrant has in the margin these words, "Province of Canada, county of Kent to wit," and is dated "at Chatham in the county of Kent," but there is a township of Chatham as well as a town of Chatham in that county, and *non constat*, the magistrate was a Police Magistrate for the town nor that he was exercising jurisdiction within the town.

2. That the offence is not sufficiently described according to the statute which prohibits the hiring, retaining, &c., any person to enlist or to serve in any warlike or military operation, for any foreign power, &c., "*as an officer, soldier, sailor or marine, or in any other military or warlike capacity.*" The latter words are not set out as part of the prisoner's offence.

3. The penalty is not discretionary in amount. The statute fixes it at $200, peremptorily. The adjudication is for a fine or penalty of only $100.

4. The amount of costs is not stated in the body of the commitment, nor in the recital of the conviction.

I incline to hold that each of these objections is fatal.

But as to the first it may be said that a general and not a local jurisdiction, is given by the letter of the statute to the judges of the County Courts, Recorders, judges of the Sessions of the Peace and Police Magistrates, and that it is only where two Justices of the Peace are acting that they must be justices of the county where the offence is committed. For the purposes of this case it is not necessary to determine this point.

The second objection is clearly fatal—for the offence is not simply hiring, &c., any person to enlist or serve in any warlike or military operation for a foreign power, but hiring, &c, such person to enlist, &c., as an officer, soldier, &c. The statutory definition is only half followed, and the prisoner is convicted of part and not the whole of what the statute declares to be punishable.

The third objection is clearly fatal, "A judgment for too little is as bad as a judgment for too much," *R.* v. *Salomons*, 1 T. R. 249. See also *Whitehead* v. *Reg.* in error 7 Q. B. 582, where a sentence of seven years transportation was passed on a conviction for an offence punishable by statute by transportation for not more than 15 nor less than 10 years.

The fourth objection is supported by Lord Mansfield's judgment in *Rex* v. *Hall*, Cowp. 60.

In my opinion the prisoner is entitled to his discharge.

Order accordingly.

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## In re Andrew Smith.

*Canadian Foreign Enlistment Act, 28 Vic. cap. 2—Sufficiency of warrant—Powers of police magistrates.*

*Held*, 1st, That a warrant of commitment on a conviction had before a police magistrate for the town of Chatham, in Upper Canada, under the recent statute 28 Vic. cap. 2, averring that on a day named, "at the town of Chatham, in said county, he the said Andrew Smith did attempt to procure A. B. to enlist to serve as a soldier in the army of the United States of America, contrary to the statute of Canada in such case made and provided;" and then proceeding: "And whereas the said Andrew Smith was duly convicted of the said offence before me the said police magistrate, and condemned," &c., sufficiently showed jurisdiction.

*Held*, 2nd, That the direction to take prisoner "to the common gaol at Chatham," the warrant being addressed "To the constables, &c., in the county of Kent, and to the keeper of the common gaol at Chatham, in the said county," was sufficient.

*Held*, 3rd, That the warrant as above set out sufficiently contained an adjudication as to the offence, though by way of recital.

*Held*, 4th, That the words "to enlist to serve" do not show a double offence, so as to make a warrant of commitment bad on that ground.

*Held*, 5th, That the offence created by the statute was sufficiently described in the warrant as above set out.

*Held*, 6th, That the warrant was not bad as to duration or nature of imprisonment.

*Held*, 7th, That the amount of costs was sufficiently fixed on the warrant of commitment.

*Held*, 8th, That there is power to commit for non-payment of costs.

*Held*, 9th, That the statute does not require both imprisonment and money penalty to be awarded, but that there may be both or either.

[Chambers, May 13, 1865.]

This was an application for the discharge of the prisoner from close custody, under writ of *habeas corpus*.

The prisoner, as appeared by return to the writ, was confined in Chatham gaol, on two charges under the Foreign Enlistment Act.

Prior to the receipt of the writ, the gaoler had received two additional warrants by the committing magistrate, the first two being open to grave objections. All the warrants were returned.

The convictions were had before Mr. McCrae, police magistrate for the town of Chatham, under the late Canadian act 28 Vic. cap. 2.

Each warrant averred that on a day named, "at the town of Chatham, in the said county, he the said Andrew Smith did attempt to procure A. B. to enlist to serve as a soldier in the army of the United States of America, contrary to the statute of Canada in such case made and provided," &c.; and then proceeded: "And whereas the said Andrew Smith was duly convicted of the said offence before me the said police magistrate, and condemned," &c.

*James Paterson* for the crown.

*J. B Read* for the prisoner.

Hagarty, J.—Mr. Read objects, first, that it was not shown that the police magistrate was acting within his jurisdiction. The warrant shows that the charge was made at the town of Chatham before Mr. McCrae, police magistrate for said town, and that the attempt to enlist was made at Chatham; and it professes to be given under the magistrate's hand and seal at Chatham. It cannot possibly intend that the magistrate acted in any way except in his jurisdiction, in the presence of these objections.

Secondly, that the directions to take prisoner "to the common gaol at Chatham" is insufficient.

The warrant is addressed "To the constables, &c., in the county of Kent, and to the keeper of the common gaol at Chatham, in the said county," and I think a direction to the said constables to convey him "to the common gaol at Chatham aforesaid," is quite sufficient.

Thirdly, that the conviction is only recited, and the warrant does not contain a direct adjudication in itself.

I think the warrant sufficiently clear from objection on that ground. The conviction itself, if produced, would be worded differently, and would express directly and not by way of recital the adjudication of the magistrate: (See *In re Allison*, 18 Jur. 1055.)

Fourthly, That "enlist to serve," shows a double offence, when "enlisting," or "serving" is sufficient.

I see nothing in this objection.

Fifthly, That the offence is not sufficiently described.

The statute declares that "if any person, &c., shall hire, &c., or attempt, &c., to hire, &c., any person or persons, &c., to enlist or to enter or engage to enlist, or to serve or to be employed in any warlike or military operations in the service of, &c, any foreign prince, state, &c, either as an officer, soldier, sailor or marine, or in any other military or warlike capacity." The words in the warrant are, "to enlist to serve *as a soldier* in the army of the United States of America, contrary to the statute," &c., omitting the words "in any warlike or military operation." On the best opinion I can form on this point, I think the warrant is good against this objection. I think the words "to enlist to serve as a soldier in the army of the United States of America," comes within the act. The word "army" does not occur in the act, but it seems to me that it is impossible to serve as a soldier in the army without serving as a soldier in some warlike or military operation. It is made an offence to serve as a soldier in any warlike or military operation, or in any other military or warlike capacity. I think to serve as a soldier in the army comes within the words of the statute. Mr. Read urged that the statute pointed to serving in actual hostile operations. I do not think it is so limited, but that it covers attempts to procure soldiers here for the army of a foreign state, at peace as well as at war. I think serving as a soldier in the army must come under either alternative, as a warlike or a military operation.

Sixthly, That the commitment for the further time beyond the six months, is not to be at hard labour, as the six months are declared to be.

I think the act does not require this. After speaking of six months at hard labour, it continues, "and if such penalty and costs be not forthwith paid, then for such further time as the same may remain unpaid," without adding "at hard labour" for such further time.

Seventhly, That adjudication is in addition to the $4.50 for costs; for all costs and charges of commitment, and conveying him the said Andrew Smith to the said common gaol, amounting to the further sum of $1.

This, I think, sufficiently fixes the amount in a warrant of commitment. As to the power to commit for such costs, the statute creating the offence merely says "may be condemned to pay a penalty of $200 with costs." I find provisions in our law for ordering payment in summary convictions, as in section 62, chapter 203, Consolidated Statutes of Canada, where, after ineffectual attempt to levy penalty and costs by distress, the committing justice may direct imprisonment, unless the sum adjudged to be paid and all costs of distress, "and also the costs and charges of the commitment, and conveying the defendant to prison, if such justice think fit so to order, the amount thereof being ascertained and stated in such commitment." I cannot therefore say that under a statute inflicting a penalty "with costs," the costs of conveying defendant to prison may not lawfully be added. In one of the cases there is no imprisonment awarded, only the penalty and costs, and imprisonment if they be not paid. Mr. Read urges that the statute requires both the imprisonment and money penalty to be awarded, and "that may be condemned to pay," and "may be committed to gaol," mean "must be condemned" and "must be committed." As I read the statute I think it was intended to allow both fine and imprisonment, or either, and that it was not compulsory to award both. I think it a harsh intendment, that in an act so worded it is compulsory to award imprisonment. As to the words "such further time," I do not think that they necessarily show that there must be a previous award of imprisonment as a substantial punishment.

I have examined the case of *In re Slater and Wells*, decided under Con. Stat. C., cap. 105, sec. 16, reported in 9 U. C. L. J. 21.

I am not wholly free from hesitation on this warrant, but on the whole I think it is sufficient, and that I am not bound to read such a document with the extreme severity of construction insisted on by the applicants.

I direct the prisoner to be remanded.

If dissatisfied with my view, he is not without a remedy by application elsewhere.*

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* Prisoner subsequently obtained from Practice Court, returnable in full Court of Queen's Bench, a rule *nisi* on the Attorney-General to show cause why a writ of *habeas corpus* should not be issued, with a view to the revision of the above decision of Mr. Justice Hagarty; but the court, holding that the judge in Practice Court had no jurisdiction to grant the rule *nisi*, declined to express an opinion on the several points decided by Mr. Justice Hagarty.—Eds. L J.

## IN RE JOHN CARMICHAEL.

*Habeas Corpus Act*, 31 *Car.* 2, *cap.* 2—*Second arrest for same offence, after discharge under writ of habeas corpus from first arrest—When such can be said to be the case—Effect thereof when prisoner entitled to the writ.*

*Held*, That where a prisoner is under a writ of *habeas corpus* discharged from close custody on the ground that the warrant of commitment charges no offonce, he is not under s. 6 of the Habeas Corpus Act, 31 Car. 2, cap. 2 entitled to his discharge as against a subsequent warrant correctly stating the offence upon the alleged ground that the second is for "the same offence" as the first arrest.

*Semble*. That a prisoner is not entitled to a writ of *habeas corpus* under the statute of Charles unless there be "a request made in writing by some or any one on his behalf, attested by two witnesses who were present at the delivery of the same.

[Chambers, June 3, 1865.]

This also was an application by a prisoner for discharge under a writ of *habeas corpus*

The prisoner was brought up before Mr. Justice John Wilson, at Chambers, on the 1st June, 1865, by the keeper of the common gaol of the United Counties of Lanark and Renfrew. upon a writ of *habeas corpus* issued on the 16th day of May last.

By the return to the writ it appeared,

1. That the prisoner had been committed to the gaol on the 21st day of April, 1865, upon the warrant of S. G. Lynn and Duncan McDonell, two of Her Majesty's Justices of the Peace in and for the said United Counties, dated the 19th day of April, 1865, charging "that he the said John Carmichael did on or about the night of the 21st day of June last past, at the village of Osceola, in the counties aforesaid, maliciously and wilfully kill and murder one David Fitzgerald."

2. That on the 23rd day of May, 1865, another warrant by the same Justices of the Peace of the same date was delivered to the said gaoler, charging that the prisoner at the same time and place "did feloniously, wilfully, and of malice aforethought, kill and murder one David Fitzgerald."

On reading the writ and the return, *James Paterson*, for the prisoner, filed

1. A warrant under the hand and seal of John D. Clendenneer, a coroner for the said United Counties, dated the 24th day of June, 1864, in these words:

"United Counties of Lanark & Renfrew. To wit: } "To Thomas Culberton, constable, and all other constables in and for the United Counties of Lanark and Renfrew, and also to the keeper of Her Majesty's jail at Perth, in the County of Lanark.

"Whereas by an inquisition taken before me, one of Her Majesty's coroners for the said counties, the day and year hereunder mentioned, on view of the body of David Fitzgerald, lying dead in the township of Bromley, county of Renfrew, John Carmichael stands charged with having caused the death by violence of the said David Fitzgerald.

"These are therefore, by virtue of my office, in Her Majesty's name to charge and command you forthwith safely to convey the body of the said John Carmichael to Her Majesty's jail at Perth, and safely to deliver the same to the keeper of the said jail. And these are likewise by virtue of my said offiice, in Her Majesty's name to will and require you the said keeper to receive the body of the said John Carmichael into your custody, and him safely to keep in the said jail until he shall thence be delivered by due course of law. And for so doing this shall be your sufficient warrant.

"Given under my hand and seal this twenty-fourth day of June, one thousand eight hundred and sixty four.

(Signed) "JOHN D. CLENDENNEER,
"Coroner U. C. Lanark and Renfrew."
[L. S.]

2. An order of the Honorable Mr. Justice Morrison. discharging the prisoner from custody under this warrant, in these words:

"Upon reading the writ of *habeas corpus* issued from this honourable court on 8th day of August last, directed to the keeper of the common gaol of the United Counties of Lanark and Renfrew, commanding him to have the body of John Carmichael detained in the said jail, as it was and is said, together with the day and cause of his being taken and detained, before the presiding judge in Chambers at Osgoode Hall, Toronto, immediately after the receipt of the said writ, upon reading the return of the said jailer to said writ annexed, both said writ and return being filed, upon reading the remand of the Chief Justice of Upper Canada, and the enlargement of the return of the said writ, and upon hearing counsel as well for the said John Carmichael as for the Queen, I order that the said John Carmichael be, and he is hereby discharged out of the custody of the said jailer or keeper of the common jail in and for the said United Counties of Lanark and Renfrew.

(Signed) "JOS. C. MORRISON, J.

"Toronto, September 1, 1864.

"To the keeper of the common jail in and for the United Counties of Lanark and Renfrew."

3. An affidavit of the prisoner, sworn to 5th May, 1865, setting out that he was then in close custody in the common jail of the United Counties of Lanark and Renfrew, charged with the killing and murder of David Fitzgerald; that on 22nd June last past he was arrested for the killing and murder of said David Fitzgerald, and committed to jail by virtue of a warrant issued by John D. Clendenneer, coroner of the said United Counties; that on the 3rd September last past he was brought up before the presiding judge in Chambers under a writ of *habeas corpus*, and discharged from custody by order of Mr. Justice Morrison*; that on the 8th April last he was again arrested for the same identical offence, viz., the killing and murder of the said David Fitzgerald, and brought before five justices of the peace for the said United Counties and committed by two of said justices, S. G. Lynn and Duncan McDonell, Esquires, to the said common gaol, contrary to 6th sec. Habeas Corpus Act, 31st Chas. II., chap. 2.

Mr. Paterson cited no authority, but contended that under the provisions of this section the prisoner could not again be committed for the same offence.

*Robert A. Harrison*, for the Crown, contended that the coroner's warrant charged no offence, and therefore it could not be said the subsequent warrants were for "the same offence," within the meaning of the statute. He also contended

See *In re Carmichael*, 10 U. C. L. J. 235.—EDS. L. J.

that as between the two subsequent warrants, if the first of the two were defective, the prisoner must still be detained for the second. He cited *In re Smith*, 3 H. & N., 227; *In re Asher Warner*, 1 U. C. L. J., N. S., 16.

John Wilson, J.—I think the prisoner was not entitled to this writ under the statute 31 Chas. II., for there was no "request made in writing by him or any one on his behalf attested and subscribed by two witnesses who were present at the delivery of the same" (sec. 3).

But, by the warrant of the coroner, the prisoner was not charged with any criminal offence. The alleged charge was "with having caused the death by violence of the said David Fitzgerald." His death might have been caused by violence where the homicide was *per infortuniam* or *se defendendo*, or in any other manner not of felony.

The prisoner is now for the first time committed for murder, and is therefore not within the provisions of the 6th section, according to the construction of it urged by the counsel for the prisoner.

If, however, by any defect in a warrant, the prisoner had been once discharged under a writ of *habeas corpus*, I should not, in the absence of authority, have discharged him, if the second warrant of commitment "were for treason or felony plainly and specially expressed in it." See *Ex parte Milburn*, 9 Peters, 710.

It is scarcely necessary to allude to the fact of there being two warrants here subsequent to that of the coroner. The first, in fact, charges the prisoner with murder in apt words. But even if the first of the two warrants were defective, the defect is cured by last one. *In re Smith*, 3 H. & N. 227, before cited.

I remand the prisoner.

Order accordingly.*

## ELECTION CASE.

(*Reported by* R. A. Harrison, Esq., *Barrister-at-law.*)

### Reg. ex rel. Chambers v. Allison.

*Con. Stat. U. C., cap. 54. ss 75, 97, sub-s. 9—Con. Stat. U. C., cap. 55, s. 60, sub-s. 2, and s. 61—Qualification of municipal electors—Sufficiency of rating—Conclusiveness of roll—New point—Costs.*

The franchise right not to be lost to any one who really is entitled to vote, if it can be sustained in a reasonable view of the requirements of the statute.

The rating of electors under s. 75 of the statute is sufficient if in the surnames of the electors, although the Christian names be erroneous.

Thus "Wilson Wilson" was held to be a sufficient rating to entitle "William Wilson" to vote, he having sworn that he was the person intended, and it appearing that he was otherwise qualified.

So "Simond Faulkner" was held to be a sufficient rating to entitle "Alexander Faulkner" to vote, he having taken the same oath, and being otherwise duly qualified.

"Thomas Sanderson" was held to be *idem sonans* with "Thomas Anderson," so as to entitle a person bearing the latter name to vote under the former as a sufficient rating.

And *held*, that the assessment roll, as to the qualification of municipal electors, is conclusive.

[Common Law Chambers, March 9, 1865.]

The relator, in his statement, complains that Samuel Allison hath not been duly elected, and hath unjustly usurped the office of councillor for Ward No. 2 in the Township of Caledon, under the pretence of an election held on Monday and Tuesday the 2nd and 3rd days of January, 1865, in the Township of Caledon, and that he the said Philip Chambers was duly elected thereto, and ought to have been returned at said election, on the ground that the said Philip Chambers had the majority of duly qualified votes polled for him, the said Philip Chambers, at the said election, and that several votes given for the said Samuel Allison were not the votes of duly qualified electors, and ought not to have been received.

The relator made oath that he was a candidate for the office of councillor for Ward No. 2, at the last election held for that office on Monday and Tuesday the 2nd and 3rd days of January, 1865; that his opponent for the said office was Samuel Allison, of Caledon, doctor of medicine; that H. Pettigrew, of Caledon, was returning officer at said election; that of the 138 persons who voted or assumed to vote at the said election, 68 voted for his opponent, and 66 for himself, and that his opponent was thereupon declared duly elected by the said returning officer, and accordingly accepted the said office; that of the votes given for his deponent, some of which he believed to be bad, were objected to at the time when tendered, and others deponent since discovered to be, as he believed, bad; that Jacob Nickson numbered on the said poll book as 17, and was not, as deponent was informed and verily did believe, either a freeholder or householder in said Caledon at the time of the said election, but a resident of the adjoining Township of Albion, and was objected to on deponent's behalf at the time of the said election, when his vote was tendered thereat; that Thos. "Sanderson," No. 20 on the poll book, was not named on the said last revised assessment roll, and his vote when tendered at the election was objected to on deponent's behalf; that Wm. Wilson, No. 21 on said poll book, was not named on the said last revised assessment roll, and his vote when tendered at the said election was objected to on deponent's behalf; that Frederick Nixon, No. 30 on said poll book, was not as deponent was informed and verily believed, either a freeholder or householder in said Township of Caledon at the time of the said election, but a young man living with his father in the adjoining Township of Albion, and was objected to on deponent's behalf at the time his vote was tendered at the said election, although the returning officer, according to the copy of the said book, did not appear to have made a note of the said objection on the face of the poll book; that Neall McBride, No. 52 on the said poll book, to whom objection was made on deponent's behalf at the time of the election, when his vote was presented thereat, was not as deponent was informed and verily believed, either a freeholder or householder in said Township of Caledon at the time of the said election, but a young man living with his father, James McBride, when at home, and at other times working out as a hired man; that Hugh Malloy, No. 66 on the said poll book, was not, as deponent was informed and verily believed, either a freeholder or householder in said township at the time of the said election, as deponent since discovered and had good reason to believe, but a resident without the municipality, in the village of Brampton; that Edward Ward and

* An application was subsequently made to the full court for a writ of habeas corpus, but the court, agreeing with the views above expressed, refused it.—Eds. L. J.

William Ward, No. 72 and 95 in the said poll book, to whom objection was made, on deponent's behalf, at the time of the said election, when their votes were tendered thereat, were not, nor was either of them, as deponent was informed and verily believed, freeholders and householders in said town-hip at the time of the said election, but young men living with their father, Edward Ward, on property belonging to their father, Edward Ward; that Alex. Falkner, No. 96 on said poll book, to whom objection was made on deponent's behalf at the time of the said election, when his vote was tendered thereat, was not at the time of the said election named on the last revised assessment roll for the said Township of Caledon; that Thos. Sparrow, No. 130 on the said poll book, to whom objection was made on deponent's behalf at the said election, when his vote was tendered thereat, was not as deponent was informed and verily believed, either a freeholder or householder in said township, but a resident of the adjoining Township of Chinguacousy; that each of the persons above named to whom objections were made as above mentioned voted for his opponent; that said objections were made at deponent's instance and on his behalf by Thomas Manton, who acted for him at the said election.

An affidavit of Thomas Manton in corroboration of the foregoing was also filed on the part of the relator.

*Robert A. Harrison*, for the relator, referred to Con. Stat. U. C., cap. 54, s. 75, s. 97, sub-s. 9; Con. Stat. U. C., cap. 55, s. 60, sub-s. 2, and s. 61, and in the first placed argued that the assessment roll was conclusive. In this view he concluded that three persons, Thomas Anderson, Wilson Williams, and Alexander Faulkner, who voted for defendant, were not on the roll—the names Thomas Sanderson, Wilson Wilson, and Simond Famlkner, intended to represent them, not being a sufficient rating to entitle them to vote. But should the roll not be conclusive, he argued that ten other persons, whose names are given in the relator's affidavit, though properly rated, were shewn not to be in truth qualified, and so in either view he contended the relator was entitled to the suit.

*D. McMichael*, for defendant, admitting that the roll was conclusive, argued that Thomas Anderson was sufficiently rated as "Thomas Sanderson," William Wilson as "Wilson Wilson," and Alexander Faulkner as "Simond Faulkner." Section 75 of the Municipal Institutions Act as to the rating of electors, not like s. 70 as to the rating of candidates requiring a rating in their own names. He filed affidavits made by Thomas Anderson, William Wilson, and Alexander Faulkner, in which they swore they were qualified electors, and intended by the rating "Thomas Sanderson," "Wilson Wilson," and "Simond Faulkner." But should the rule not be conclusive, he objected to several persons who voted for relator, and who, though regularly rated, were not really qualified.

John Wilson, J.—The Con. Stat. U. C., cap. 55, s. 19, directs that the assessor shall prepare an assessment roll, in which after diligent enquiry he shall set down, according to the best information to be had, the name and surname in full, if the same can be ascertained, of all taxable parties resident in the municipality who have taxable property therein.

Sec. 60, sub-s. 1, enables any person complaining of an error or omission in regard to himself, as having been wrongfully inserted on or omitted from the roll, or as having been undercharged or overcharged by the assessor in the roll, to give notice in writing to the clerk of the municipality that he considers himself aggrieved for any or all of the causes aforesaid.

The Court of Revision, after hearing upon oath the complaint, shall determine the matter, and confirm or amend the roll accordingly, s. 60, sub-s. 12.

The roll, as finally passed by the Court and certified by the clerk, as so passed, shall be valid and bind all parties concerned, notwithstanding any defect or error committed in or with regard to such roll, except in so far as the same may be further amended on appeal to the judge of the County Court, s. 61.

Then the Con. Stat. U. C., cap. 54, sec. 97, sub-s. 2, requires the clerk of the municipality to deliver to the returning officer who is to preside at the election for the same or every ward thereof, a correct copy of so much of the last revised assessment roll as contains the names of all male freeholders or householders rated upon the roll in respect of real property, with the assessed value of the real property for which every such person is so rated.

By the 75th section the electors shall be those who among other things were rated on the last revised assessment rolls for real property in the municipality.

Persons to be elected as members of a council are those who have freehold or leasehold property rated in their own names on the last assessment roll of such municipality, s. 70.

Sec. 97, sub-s. 9, declares that the only oaths to be required of any person claiming to vote, and appearing by the last revised assessment roll to have the necessary property qualification are, among others, that he is the person named in the last revised assessment roll.

Philip Chambers, the relator, and Samuel Allison, the defendant, were candidates at the last election for the office of councillor for Ward No. 2 in the Township of Caledon.

The list of votes furnished to the returning officer contained three names which gave rise to this contention—Thomas Anderson, Wilson Wilson, and Simond Faulkner, each in respect to qualification entitled to vote.

There were in fact no persons thus named resident in the ward; but Thomas *Sanderson* came and said he was named as Thomas *Anderson* in the list, and the returning officer allowed him to vote for Samuel Allison, and recorded his vote in his proper name, he having taken the oath at the election as directed in the statute. He now swears that he was the person rated as "Thomas Anderson." The relator's counsel argues that the two names when written are in no way alike, but I think they when pronounced are *idem sonans*, and are not distinguishable unless a pause is made between the name and surname *William* Wilson came also and said he was named in the list as *Wilson* Wilson, and the returning officer allowed him to vote for Samuel Allison, and

recorded his vote in the proper name, he too having taken the prescribed oath at the election. He now swears that he was the person named and described in the assessment roll as "Wilson Wilson." *Alexander* Faulkner came in the same way and said he was the person named on the roll as *Simond* Faulkner, made the same statements, took the same oath, was allowed to vote for Samuel Allison, and had his vote recorded in his own name. He now swears he was the person intended under the name of Simond Faulkner.

It is not denied that these men were qualified to vote, but it is contended they are not on the last assessment roll or voters' list, as required by the statute, and that the returning officer ought not to have taken their votes. The defendant Allison had at the close of the poll 68 votes including these three, and Chambers, the relator, had 66 votes. Allison was declared elected, and took his seat as councillor. But if these three votes are struck off. Allison, for whom they voted, will have but 65 votes, while the votes for Chambers will be 66, who will thus be entitled to take his seat as councillor instead of Allison, who in this view has usurped the office.

I think the franchise ought not to be lost to any one really entitled to vote if his right to it can be sustained in a reasonable view of the requirements of the statute.

It was clearly intended that persons resident within the municipality, and properly qualified, should have the right to vote for municipal officers; but it is equally clear that it was intended that no one should vote whose name and qualification were omitted from the roll, for in these respects the Court of Review has express power to correct the roll, and impliedly, I suppose, has the right to correct an error in the name of any one who requests it.

The assessor is directed upon diligent inquiry to set down according to the best information the name and surname in full, if the same can be ascertained, and only those who have been rated on the last revised assessment roll are entitled to vote. There is a distinction in the words of the 70th section respecting those who are candidates for office and of the 75th section regarding who are voters only. In the former section those only who are rated "in their own names" on the last assessment roll can be candidates, but in the latter one those may vote who are rated on the last revised assessment roll.

Now were these men rated on the last assessment roll and returned in the list furnished to the returning officer? They swear they were; but this does not answer the question. Let us see what is to be done in rating them. The assessor is to make diligent enquiry. He asked we may assume of the first voter, What is your name? He answered, Thomas Sanderson; but if the whole name is pronounced without pause or peculiar emphasis it sounds as much like Thomas Anderson as Thomas Sanderson. It was written, I infer, Thomas Anderson, and the peculiarity of it is that if it had been repeated by the writer it afforded no means of correction. Questions of *idem sonans* have usually arisen in the spelling of names, but this is an instance of it in pronouncing them, and the duty of the officers was to set down the name on inquiry; and the duty of the person to be assessed to answer it if so asked *viva voce*, and he could not tell except by inspection whether it was right or wrong. When written they have no resemblance, but quite otherwise when spoken.

As to Wilson Wilson instead of William Wilson, or, as it should be written in the list, Wilson Williams, the suggestion is offered which is at least plausible, that as the surname is usually written first, the assessor having written the name first forgot for the moment that he had done so, and wrote it again as if he had written the surname first. The name is right beyond question.

As to Faulkner it is not suggested how "Simond" was written for "Alexander," but suppose in both cases that no surname had been written, and the surname only appeared on the roll, would either of them have been the less rated because his christian name did not appear? and would either be in reasonable fairness less entitled to his franchise, when it was not even doubted that he was the man, and had the qualification which gave it to him?

It has been argued that because the 61st section of cap. 55 declares that "the roll as finally passed by the Court (of Review), and certified by the clerk as so passed, shall be valid and bind all parties concerned, notwithstanding any defect or error committed in or with regard to such roll. Every person should examine it after it after it has been put up for inspection, to see that it is right in every respect. This would no doubt be prudent, for its omission may deprive a man of his franchise who neglects it; but I may safely say that if men trust, as most men do trust, that a public officer does his duty, I cannot lay down a rule so strict as to require suspicious vigilance regarding the acts of such officers. I know, we are so constituted that even when we intend to be very careful, and suppose we are acting scrupulously so, we fall into mistakes caused, perhaps, by the over anxiety to avoid it.

I think, under all the circumstances, the first voter was rated by a name *idem sonans*, and the last two by their names, although the surnames were wrong. I think it would be carrying the rule to an extreme at variance to one's sense of right to hold that because a man's surname was not right in every respect he should be deprived of his right to vote, when his neighbours as well as himself knew he was in right of his qualification entitled to vote.

The case, however, is presented in another point of view, namely, that the returning officer had no right to put any name on his poll book which was not on his list, and that he did put on his poll book the names of three voters whose names were not on the last list furnished by the clerk to him.

This is more plausible than sound, for it is the same proposition as the one first discussed, "That if the voters' names on the list do not correspond with the names as given when they come to vote, they have not been rated at all, and have no right to vote.

If the returning officer in the honest discharge of his duty had rejected these votes, he could not have been fairly charged with misconduct or indiscretion; nor can he be so charged in doing what he did.

He no doubt conscientiously felt that they were the voters who had the franchise, and he very probably knew they lived on the land in right of which they claimed to vote, and I approve of his conduct, for if he had adopted the first alternative he might have been denying a positive right, while by adopting the latter he left the right to be questioned before the proper tribunal.

For what he did he may have known that he had a precedent in the practice of our own courts analogous to his own procedure. In jury lists the jurors are designated by the numbers of their lots, but the names and surnames are frequently found wrong. They come when called, and say their names are not right, and on its being ascertained they are the persons intended, the names are corrected, and they are then taken to be the jurors retained.

Some of my learned brethren have decided that we shall not go behind the assessment roll and constitute ourselves a Court of Review. I concur with them, and in this matter I am not infringing upon their decision. I hold only that in this case these men are upon this list so as to entitle him to vote although not correctly named thereon.

My order is in favor of the defendant, but as the points are new, without costs.

Order accordingly.

## ENGLISH REPORTS.

### Parkinson v. Hanbury.

*Costs—Taxation—Fees to counsel—Discretion of master.*

It is within the discretion of the taxing master to allow or disallow the amount of fees paid to counsel, and the court will not review his taxation where his certificate is objected to only in respect of such allowances.

[Chancery, June 9, 1865.]

In this suit an appeal by the plaintiff, Miss Parkinson, was recently dismissed with costs by the Lords Justices (11 L. T. Rep. N. S. 755.) The bills were carried in before taxing master Skirrow, who allowed to defendants the fees paid to their counsel upon the appeal, namely, twenty guineas and two guineas for consultation to the leading counsel, and twelve guineas and one guinea for consultation to the junior, which fees were the same in amount as had been paid to them upon the original hearing of the cause.

Miss Parkinson in person now moved, in pursuance of notice given by her, that the master might be directed to review his certificate so far as the allowance of these fees was concerned, and contended that, considering the nature of the case and the amount of necessary matter laid before counsel, the fess were unduly large.

The certificate was not objected to in any other particular.

*Kay*, for the defendants, contended that the allowance was within the master's discretion, and produced Skirrow's certificate, in which he relied upon the general rule, that it was usual to allow upon an appeal the same fees as had been paid at the original hearing, and stated moreover that, in the present instance, he considered the fees to be moderate.

Lord Justice Knight Bruce said that it might perhaps be desirable that their Lordships should have the opportunity of seeing the briefs which had been delivered before they decided the question, but he would defer to the opinion of his learned brother, and leave the matter entirely to him.

Lord Justice Turner said that he thought clearly that this motion should be refused. If the court was to be called upon to consider and adjudicate upon the amount of fees paid to counsel on their briefs, and whether those fees were to be ten guineas, or fifteen, or twenty, the vexation and injury to the suitors would be infinite, and innumerable questions would be raised. These matters had always been left to the discretion of the taxing master, and it was most proper that they should be still left to him. Here the question had been considered by him—the fees had been allowed, and the motion must be refused with costs.—*Law Times Reports.*

## UNITED STATES REPORTS.

### COURT OF COMMON PLEAS—NEW YORK.

### Rittenhouse et al. v. The Independent Line of Telegraph.

*Liability of telegraph companies.*

A telegraph company is not excused from liability for an erroneous transmission of a message, by the fact that its meaning was unintelligible to them, so long as the words were plain.

Where an order is sent by telegraph for the purchase of one article, and by a blunder of the operator, the dispatch is made to read as an order for another, the company must make good any difference between the price paid for the article actually ordered, if purchased as soon as the error was discovered, and the price at which it could have been bought when the dispatch was received. But they are not liable for a loss upon a resale of the article bought under the direction of the erroneous dispatch, unless they have had fair notice of such resale.

By the Court: Brady, J.—The dispatch written by the plaintiffs was an order to their brokers here to sell their Michigan Southern stock, and to buy five hundred shares of Hudson River Railroad stock. The language employed, however indefinite to others, was intelligible to the brokers. The dispatch written was not sent, and the effect of the error was to make it an order to sell the shares of Southern and to buy five hundred more. As to this, the erroneous dispatch is neither uncertain nor indefinite. No other interpretation can be fairly given to it. The evidence established the fact that the use of words "five Hudson," by an understanding between the plaintiffs and their brokers, meant five hundred shares of the Hudson River Railroad stock, and also that the erroneous dispatch was understood to be an order to purchase five hundred shares of the Michigan Southern, and which, as before suggested, was the only conclusion to be drawn from the language employed. These views dispose of the exceptions to the sufficiency of the evidence to warrant the findings of fact upon which the judgment is based. The plaintiffs, on learning that an error had been committed, again directed the purchase of the Hudson River Railroad stock, and were entitled to the advantages of such purchase at the rates prevailing on the day of the date of the dispatch, without reference to the session of the Board when the dispatch was received. The omission

to buy at the Board on that day arose from the defendants' misconduct in sending the dispatch, and it became the duty of the broker, under his instructions, to make the purchase at once. The defendants, having placed it beyond the power of the plaintiff's brokers to make the purchase in the particular manner indicated, cannot avail themselves of the fact that the purchase was not made in that mode. They cannot take advantage of their own wrong, particularly when it nowhere appears that they were injured by the circumstance. The prices paid were the lowest at which the stock could be obtained, and the defendants had the benefit of that fact. The purchase was voluntary, it is true, but it was an act which the plaintiffs had the right to perform, growing out of their relations with the defendants, established by the contract on the part of the latter to transmit the dispatch faithfully. These views are responsive to the exceptions taken to the legal conclusions arrived at upon the trial, and leaves but one to be considered The plaintiffs' claim for a difference of $475 on the sale of the five hundred shares of Michigan Southern was disallowed upon the ground that the stock was in legal effect purchased on defendants' account and could not be sold without some notice to them. I think this ruling was a proper one, the relations of the parties being considered. If the plaintiffs intended to disavow the purchase, the defendants should have been notified thereof, and in that way enabled to keep the stock or not, as they might deem most advisable. By exercising the act of ownership in the sale made, they have adopted the purchase, and the sale must therefore be regarded as on their account. But if this view be incorrect, there can be no doubt that the defendants were entitled to notice of the mistake made by them before any sale of the stock, purchased in pursuance of their erroneous dispatch, was made For these reasons, the judgment must be affirmed.—*N. Y. Transcript.*

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## SUPREME COURT OF PENNSYLVANIA.

### Moyer v. Moyer.

*Slander—Evidence of general bad character in mitigation of damages.*

In an action to recover damages for slander in saying that plaintiff had committed perjury, evidence of the plaintiff's general character for truth and veracity is admissible in mitigation of damages.

Error to Common Pleas of Elk County.

The opinion of the Court was delivered by Read, J.

Mr. Pitt Taylor, in the 4th edition of his Treatise on the Law of Evidence, in speaking of evidence in mitigation of damages, in Slander and Libel, says, "Whether in an action for defamation, evidence impeaching the plaintiff's previous general character, and showing that at the time of the publication, he laboured under a general suspicion of having been guilty of the charge imputed to him by the defendant, is admissible as affecting the question of damages, is a point which has been much controverted;" and after stating the arguments on both sides, he says, "such being the arguments on either side of this vexed question, it remains only to observe that the weight of authority inclines slightly in favor of the admissibility of the evidence, even though the defendant has pleaded truth as a justification, and has failed in establishing his plea." "It seems, however, that here, as in other cases, where witnesses to character are admitted, evidence must be confined to the particular trait which is attacked in the alleged libel, and as to this, it can only furnish proof of general *reputation*, and must by no means condescend to particular acts of bad conduct." Vol. 1, page 354, 355, 356.

In *Teese* v. *Huntingdon*, 23 Howard, 2, it was clearly established as the general rule in the United States, that in impeaching a witness the inquiry should be as to his reputation for truth and veracity. In *Chess* v. *Chess*, 1 Penn. Rep. 32, this is undoubtedly the rule—and in *Gilchrist* v. *McKee*, 4 Watts. 380, where it was held that the character of a female witness for veracity could not be impeached by evidence of her general character for chastity, Chief Justice Gibson said, "But if an inquiry into reputation for a particular vice be inadmissible, it is not easy to comprehend how an inquiry into reputation for a variety of vices may be less so. Granting that universal immorality includes want of veracity, yet a man may be generally vicious, without being universally so. He may be intemperate, incontinent, profane, and addicted to many other vices that ruin the reputation, and yet retain a scrupulous regard for truth. Countless instances of such partial exemption from depravity are in the knowledge of every one. It is, after all, character for veracity alone with which the jury have to do, and why not let it come to them in the first instance without admixture of ingredients that may alter its quality and corrupt its influence. If character for veracity be the legitimate point of inquiry, and if to this complexion it must come at last, it follows that it is the only one, and that an inquiry into anything else is illegitimate."

It seems therefore from these authorities that in an action for slander in saying that the plaintiff had committed perjury, the defendant would be permitted to prove in mitigation of damages, the plaintiff's general bad character for truth and veracity. So where the charge is of dishonesty, or immorality, or want of chastity, the evidence in each case would be of a general bad reputation for either of those vices. With regard to want of veracity, or lying, it may be a confirmed habit in persons of otherwise excellent character, as we all of us know, of notable examples of men of integrity who are known to be habitual liars. When, therefore, the alleged slander is an accusation of perjury, it seems inevitable that the defence might be a bad general reputation for veracity, whilst the general reputation for integrity and honesty might be good.

We are however met by two cases in our own State, the first, of *Long* v. *Brougher*, 5 Watts, 439, really decides nothing bearing upon this question, and the second, *Steinman* v. *McWilliams*, 6 Barr, 170, is an opinion of Judge Coulter's, founded mainly on the pleadings, and also upon authorities in two other States, those in New York made under peculiar circumstances, and under a mistaken view of the English rule,

and those in Massachusetts have been so modified by subsequent decisions as to greatly weaken, if not destroy their applicability.

These cases, if applicable, are, however, substantially overruled by *Conro* v. *Conro*, 21 Legal Intelligencer, 124, where the slander was of want of chastity in gross terms, and was met by evidence in mitigation of damages, of a bad general reputation in that particular. This decision is undoubtedly applicable to the present case, which was an action of slander for a charge of perjury, and the evidence rejected was a bad general reputation for truth and veracity. Upon authority therefore, and clearly upon principle, the evidence should have been admitted.

Judgment reversed, and *venire de novo* awarded.

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## SUPERIOR COURT.

Before Robertson, C. J., Garvin and McCunn, J.J.

### Wilkins v. Earle et al.

*Liability of innkeepers for money lost from safe.*

The rules of law governing the liability of an innkeeper for the safety of a guest's baggage, are the same as those which regulate the liability of common carriers as to a passenger's baggage.

An innkeeper is liable to a guest for the loss of a sum of money brought into the inn only for an amount sufficient for his travelling expenses, in the absence of proof of a special contract.

A notice posted in defendant's hotel required a package deposited in defendant's custody for safe keeping to be "properly labelled," and the clerk informed plaintiff that he must describe the property before a redelivery. The plaintiff, on delivering a package for deposit in defendant's safe, informed the clerk that it was "money," and wrote his name upon the envelope.

*Held*, that this did not amount to a special contract for the safe keeping of the deposit, and the plaintiff was guilty of negligence in not describing the value of the package more particularly.

A notice, to be sufficient to relieve the plaintiff from the imputation of negligence, should be not only of the kind of property, but its value.

[General Term, June 28.]

In this case, the Chief Justice delivered the following opinion:

By the Court: Robertson, C. J.—The liability of keepers of inns for property, which travellers who are guests therein bring with them, is as old as the existence of inns in England (Hollingshed's Chronicle, cited in Edw. on Bailment, App. 620). The whole doctrine in relation thereto is summarily stated in the recital of an ancient original writ, entered in the Register of Writs (f. 105) among writs of trespass (on the case), and set out at length in Fitzherbert's *Natura Brevium* (94 a. b.). Such writ forms the groundwork of the early decision in *Coyle's* case (8 Rep. 32), in which the general principles embraced in such doctrine are evolved from such writ; all of which have some bearing on this case, and are in substance as follows:

1. The place of loss is required to be an inn (*commune hospitium*), which is defined to be "a house where the traveller is furnished with everything he has occasion for on the way" (*Thompson* v. *Lay*, 3 B. & A. 283), the keeper of it not being bound to furnish anything else (*Fell* v. *Knight*, 8 M. & W. 276); such as a place of sale for goods (*Burgess* v. *Clement*, 4 M & S. 306), or to receive any one but travellers (*Rex* v. *Luellin*, 12 12 Mod. 445), or anything but what is usually brought with or carried by them (*Broadwood* v. *Granava*, 10 Ex. 417; S. C. 24 Law J. [Ex.], 1). Although he is liable to an action for not receiving them (Com. Dig. Action on the case; *Rex* v. *Jones*, 7 C. & P. 213; Bacon's Abr. Inns Court, C. 3; *Thompson* v. *Lay*, 3 B. & A. 283), as well apparently as indictment (Year Book, 5 Edw. IV., Easter T., fol. 10, by Hogdon, J.; 1 C. & K. 404; Edw. on Bailm. 408), he cannot make any terms or conditions with his guests (6 T. R. 17, per Ld. Kenyon; *Cole* v. *Goodwin*, 19 Wend. 269, per Cowen, J.). A house becomes an inn by the mere custom of receiving persons transiently as guests, without a definite agreement as to time (*Wintermonte* v. *Clarke*, 5 Sandf. 242; *Taylor* v. *Monnot*, 4 Duer, 116). But a mere restaurant or place of eating is not one (*Carpenter* v. *Taylor*, 1 Hilt, 193).

2. The guest must be a traveller (1 Roll. Abr. 394; 2 Brome, 254; *Rex* v. *Luellin*, 12 Mod. 445; *Ingolsbee* v. *Wood*, 36 Barb. 452; Bocon's Abr. Inns, C. 5; *Parkhurst* v. *Foster*, Salk. 383); the time of his stopping is, however, immaterial, whether it be of some duration or for mere refreshment (*Barnell* v. *Mellor*, 5 T. R. 273; *Carpenter* v. *Taylor*, 1 Hilt. 193; *McDonald* v. *Egerton*, 5 Barb. 56).

3. The loss or injury for which the innkeeper is liable is that of or to goods and chattels (*bona et catalla*) placed within the inclosure and shelter of the inn and its appurtenances (*infra hospitium*), as laid down in the Year Books (11 Hen. IV. 45 a. b.; 22 Hen. VI. 21 b.; 42 Eliz. 3, 11 a. b.; 42 Ap. pl. 1). Although animals put out to pasture at the guest's request are not so (1 Roll. Abr. 34; 4 Len. 6; 2 Browne, 255; *Hawley* v. *Smith*, 25 Wend. 262); yet vehicles left in the street by the innkeeper's servant (*Jones* v. *Tyler*, Ad. & El. 522), or a waggon-load of goods in like manner placed in an unenclosed shed (*Piper* v. *Manny*, 24 Wend. 282), or a sleigh-load of grain in an outhouse, where such articles were usually stored (*Clute* v. *Wiggins*, 14 J. R. 175), and goods placed in a "commercial" room (*Richmond* v. *Smith*, 8 B. & C. 9), were held to be so.

4. The person by whom the articles were taken, or the mode of loss, is immaterial (Year Book, 22 Hen. VI. 38, pl. 8; Roll. Abr. Tit. Hostler, 7; *Clute* v. *Wiggins*, *ubi sup.*; *Giles* v. *Libby*, 36 Barb. 70; 2 Kent's Com. 593; Story's Com. 306, secs. 470, 479; Bell's Com. 402–3, 4th ed., 496, 5th ed.; Edwards on Bailm., 400, 403, 407; Jones on Bailm. 94), unless such person were the servant or companion of the guest (Cro. Eliz. 285; *Burgess* v. *Clements*, *ubi sup.*; *Fowler* v. *Dorlan*, 24 Barb. 384), or the negligence of the guest contributed to the loss (10 Eliz., Dyer, 266; *Burgess* v. *Clements*, *ut ante*; *Farnsworth* v. *Parkwood*, 1 Stark. 249).

5. For clothing, ornaments of the person, including a reasonable amount of jewellery generally worn by travellers, which embraces a gold watch and chain, gold pen and pencil-case (*Giles* v. *Libby*, *ubi. sup.*), and for sufficient money to pay the travelling and other reasonable daily expenses of the guest, the innkeeper is held liable (*Taylor* v. *Monnot* and *Giles* v. *Libby*, *ubi sup.*; *Van Wyck* v. *Howard*, 12 How. Pr. 197; *Stanton* v. *Leland*, 4 E. D. Smith, 88).

(*To be continued.*)

## GENERAL CORRESPONDENCE.

To the Editors of the Law Journal.

Gentlemen,—Presuming upon the kindness which you have ever extended to the student as well as the practitioner in your exposition of doubtful points, I have taken the liberty of placing my trouble before you, which is as follows:

I was admitted a member of the Law Society as a student-at-law in Trinity Term, 1865, and am consequently, in accordance with a late resolution passed by the Benchers of Osgoode Hall, eligible to compete for the first year's scholarship at the examination in November next. Now what I desire to know is this—am I eligible for the second year's scholarship, to be competed for in November, 1866?

Although I have propounded this question to several of the legal profession here, I have as yet been unable to obtain any definite information on the point, and your answer in the next number of the *Law Journal* would, I am certain, be of interest to others similarly situated, as well as to a

Student-at-law.

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[See page 228.—Eds. L. J.]

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Belleville, 16th August, 1865.

To the Editors of the Law Journal.

Gentlemen,—Will you allow me to call your attention to what seems to me to be a serious practical defect in the Registration Act? Section 18 provides that deeds, &c., are to be registered through memorials thereof. Section 20 provides for the execution of such memorial. Section 23, *et seq.*, provides modes of proof for registration; section 27 for cases in which the witnesses have died, or are out of the Province. No provision is made for the death of the parties to the deed. So long as any one of them is alive, he can re-execute the deed by acknowledging his hand and seal before the requisite witnesses, and have a memorial executed; so that section 27 is of but little practical value.

The Legislature evidently intended to give a much wider reach to the section than it has, and provide for the case of the death of the parties as well as of the witnesses, the latter part of the section evidently pointing to the registering of the instrument, on its production, with the certificate signed by the chairman, &c.; but by the operation of section 18, a memorial must be produced, and by section 20 that memorial must be executed by one or more of, &c.

Yours truly,

Geo. D. Dickson.

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[We think our correspondent has somewhat misconceived the effect of the sections referred to. Section 20 provides for the registration of a deed after the death of the grantee, provided there is a witness to the execution of the deed who can attest its execution; for it expressly authorises the heir, executor or administrator, &c., of the grantee to execute a memorial. It is thought by some that the word "heirs," would include purchasers; but, however that may be, the act now before Parliament to amend the Registry laws, makes this provision much more general, and will thereby, if the bill becomes law, save any question as to this. If, however, the witnesses are dead, or the witnesses and grantee are both dead, proceedings should be taken under section 27. It will be remarked that this section says nothing about a memorial, but provides that upon the necessary certificate being obtained, "the registrar, &c., shall *record such deed*, &c., *and certificate*, and shall certify the same." We do not think it an unreasonable construction to put upon the section to say that in such cases a memorial is not required. The case seems to be an exception to the general rule that a memorial is necessary, and an act must be so read that every clause it may, if possible, have due operation. We cannot say what the *general* practice is, but in the registry offices for York and some other counties, it is usual to record the deed and certificate, and no memorial is required by the registrar. —Eds. L. J.]

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*Concurrent writs—Antedating — Cancellation of stamps.*

To the Editors of the Law Journal.

Gentlemen,—In issuing a *concurrent* writ of summons on a day after issuing the original writ, should the Clerk not only antedate the writ, but also cancel the stamp as of the day on which the original writ was issued? Or should he simply antedate the writ and cancel the stamp as of the day he issues the writ?

By answering the above queries, you will much oblige your obedient servant,

Cornwall, Aug. 16, 1865. Lex.

[The C. L. P. Act provides that the concurrent writ will be antedated, or rather bear the same date as the original writ. But there is no statute providing that the stamp shall be cancelled as of the day on which the original writ issued; and in the absence of such, it would, in our opinion, be improper, if not illegal, to do so in regard to the stamp.—Eds. L. J.]

## MONTHLY REPERTORY.

### COMMON LAW.

Q. B. —— May 6.

Cowell v. The Amman Aberdare Colliery Company.

*County Court—Costs—Reference by consent before trial—Meaning of "recover" in 18 & 14 Vict. c. 61, s. 11.*

An action having been commenced, and issue joined between the parties thereto, who were within the jurisdiction of the same county court, was by consent referred, before trial, to the decision of an arbitrator, "the costs of the cause to abide the event of the award." The arbitrator found for the plaintiff, with twenty shillings damages, and the master allowed him his costs, the award being in his favour.

Held, that the plaintiff was not entitled to his costs, having "recovered" a sum less than £20, within the meaning of 18 & 14 Vict. c. 61, s. 11, and being therefore deprived of costs by that section. (13 W. R. 715.)

Ex. May 1.

Union Bank of Manchester v. Beech.

*Principal and surety—Release of principal.*

The defendant executed a guarantee under seal to secure a floating balance due from T. to the plaintiffs, and the deed contained a proviso that no forbearance to, or composition with, the principal, should discharge the defendant, but that the plaintiffs might deal with the principal at their discretion. Afterwards T. entered into a deed of arrangement, which the plaintiffs executed. The deed contained an assignment for the benefit of creditors, and a release of the debtor, without any reservation of rights against sureties.

*Held*, that the latter deed did not discharge the defendant from his liability as surety. (13 W. R. 922.)

H. of L. June 13.

Blades v. Higgs.

*Game—Property in animals* feræ naturæ.

If a trespasser starts game in the land of A., and hunts it and kills it there, the property in such game vests absolutely in A., and not in the trespasser. (13 W. R. 927.)

Q. B. June 17.

Lochlin v. Richardson.

*Practice—Venue*

The marginal statement of venue is, under Gen. Reg. T. T., 1853, r. 5, incorporated with the declaration, and therefore in a local action it amounts to an averment that the cause of action arose in the county named, and, if this fact be contradicted by the evidence, gives ground for a nonsuit. (13 W. R. 940.)

C. P. June 10.

Hurst v. Great Western Railway Company.

*Railway—Conveyance of passengers—Liability for punctuality of trains—Evidence of contract of duty—Time table—Ticket.*

The Great Western Railway Company's line extends from C. to G., and from G. to N. the line belongs to other companies. By arrangements with those companies the Great Western Railway Company issue tickets from C. to N. The plaintiff took a ticket from C. to N., and he and another person stated in evidence that they knew that the train ought to start from C. at 4 34, and arrive at G. at 7.39, in which case the plaintiff would have gone by the 8 17 train from G. to N. The plaintiff was told by the station-master when he took his ticket that he would go through to N. by the train about to start, and he was also told afterwards by a porter that the train should start 4.34. The train, owing to a break-down, was late at C., and in consequence the plaintiff missed the 8 17 train from G.; and he could not proceed from thence to N. till the 8.17 train next day, and incurred various expenses and losses, for which he brought this action. The ticket was put in evidence on the part of the plaintiff, but the defendants' train bill was not. No evidence was given on the part of the defendants.

*Held*, that the plaintiff could not recover, as there was no evidence of any breach of contract or duty on the part of the defendants. (13 W.R. 950.)

### CHANCERY.

H. of L. —— May 12.

Leather Cloth Co. v. American Leather Cloth Co.

*Trade mark—Infringement—False representations—Colourable imitation—Property in trade mark.*

The Court of Chancery will not protect a person in the use of a trade mark which contains false or misleading representations concerning the character of the goods to which it is applied.

Accordingly, where the purchasers of a manufacturing business, and of the right to use a trade mark, adopted and continued the use of such trade mark, which contained the name of the firm from whom they purchased, and statements and representations which had ceased to be true as regarded the article they manufactured.

*Held*, that they were not entitled to relief against an infringement of such trade mark.

Observations as to the meaning of the expression "property" in a trade mark, and as to what amounts to a colourable imitation of a trade mark. (13 W. R. 873.)

L. J. June 15.

Munro v. The Wivenhoe and Brightlingsea Railway Company.

*Interlocutory injunction — Comparative injury — Specific performance—Railway company—Contractor—Withholding of certificates—Practice—Evidence.*

The court will not, by an interlocutory injunction, restrain an act, the validity of which, as between the parties to the suit, is matter of doubt, and for which, if wrongful, the plaintiff can obtain adequate compensation in damages at the hearing of the cause; while the injunction, if granted, would inflict serious injury on the party sought to be restrained.

The court, on motion for an injunction, will act as well according to the comparative injury which may arise from granting or withholding the injunction, as according to the justice of the case as appearing on the evidence.

The court will not interfere by injunction between the parties to a contract, specific performance of which cannot be decreed.

Per Turner, L. J.—On motion for an injunction, it is open to counsel to use any affidavit filed before he addresses the court. (13 W.R. 880.)

V. C. K. June 15.

Talbot v. Marshfield.

*Practice—Production of documents—Trustees' dealings.*

Where trustees deal with a trust fund, all the *cestuis que trustent* have a right to see the documents relating to such dealings, unless there is a special reason why they should not.

If trustees take the opinion of counsel to guide them in the trust, simply, the *cestuis que trustent* have a right to see those opinions, but not cases and opinions taken after adverse proceedings and relating to such litigation. (13 W.R. 885.)

L. J. June 29.

Galloway v. City of London.

*Practice—Stay of proceedings pending appeal—Jurisdiction—Dismissal of bill.*

Where a bill is dismissed, the jurisdiction of the court over the cause is gone, and no order can be made to bind the parties pending an appeal to the House of Lords.

Where a plaintiff, whose bill is about to be dismissed, intends to appeal to the House of Lords, he should ask that the decree dismissing the bill should be so framed as to keep alive the jurisdiction of the court pending the appeal.

*Oddie* v. *Woodford*, 3 My. & Cr. 625, followed; *Price* v. *Salusbury*, 11 W. R. 1014, overruled. (13 W. R. 933.)

## AUTUMN ASSIZES, 1865.

EASTERN CIRCUIT.

*The Hon. Mr. Justice Hagarty.*

| | | |
|---|---|---|
| Ottawa | Tuesday | 3rd October. |
| L'Orignal | Monday | 9th October. |
| Cornwall | Thursday | 12th October. |
| Brockville | Wednesday | 18th October. |
| Perth | Monday | 23rd October. |
| Kingston | Tuesday | 7th November. |

MIDLAND CIRCUIT.

*The Hon. The Chief Justice of Upper Canada.*

| | | |
|---|---|---|
| Whitby | Monday | 2nd October. |
| Cobourg | Thursday | 5th October. |
| Peterborough | Monday | 16th October. |
| Lindsay | Friday | 20th October. |
| Napanee | Wednesday | 25th October. |
| Picton | Monday | 30th October. |
| Belleville | Friday | 3rd November. |

HOME CIRCUIT.

*The Hon. Mr. Justice Morrison.*

| | | |
|---|---|---|
| Milton | Monday | 2nd October. |
| Welland | Thursday | 5th October. |
| Niagara | Monday | 9th October. |
| Barrie | Monday | 16th October. |
| Owen Sound | Tuesday | 24th October. |
| Hamilton | Monday | 6th November. |

OXFORD CIRCUIT.

*The Hon. Mr. Justice John Wilson.*

| | | |
|---|---|---|
| Simcoe | Tuesday | 3rd October. |
| Cayuga | Monday | 9th October. |
| Brantford | Thurday | 12th October. |
| Guelph | Tuesday | 17th October |
| Berlin | Tuesday | 24th October. |
| Stratford | Friday | 27th October. |
| Woodstock | Tuesday | 31st October. |

WESTERN CIRCUIT.

*The Hon. The Chief Justice of the Common Pleas.*

| | | |
|---|---|---|
| Goderich | Tuesday | 10th October. |
| Sarnia | Monday | 16th October. |
| St. Thomas | Thursday | 19th October. |
| London | Tuesday | 24th October. |
| Chatham | Tuesday | 7th November. |
| Sandwich | Tuesday | 14th November. |

YORK AND PEEL AND CITY OF TORONTO.

*The Hon. Mr. Justice Wilson.*

| | | |
|---|---|---|
| York and Peel | Monday | 9th October. |
| City of Toronto | Monday | 6th November. |

## APPOINTMENTS TO OFFICE.

NOTARIES PUBLIC.

JAMES KEITH GORDON, of Whitby, Esquire, Attorney-at-Law, to be a Notary Public in Upper Canada. (Gazetted August 12, 1865.)

COLUMBUS H. GREEN, of Toronto, Esquire, Barrister-at-Law, to be a Notary Public in Upper Canada. (Gazetted August 12, 1865.

CORNELIUS VALLEAU PRICE, of Kingston, Esquire, Attorney-at-Law, to be a Notary Public in Upper Canada. (Gazetted August 12, 1865.)

DANIEL McCARTHY DEFOE, of Toronto, Esquire, Attorney-at-Law, to be a Notary Public in Upper Canada. (Gazetted August 12, 1865.)

## TO CORRESPONDENTS.

"Student-at-Law"—"Geo. D. Dickson"—"Lex"—under "General Correspondence."

"A Ratepayer" too late for this number.

We have received a communication apparently posted at "Mitchell" and signed "an old subscriber." If so, he must surely be aware of our rule that we cannot notice communications not verified by the name of the writer. In any case however, we do not think the subject matter of the letter of such general interest as to warrant us in answering it.

## DIARY FOR OCTOBER.

3. SUN ... 16*th Sunday after Trinity.*
2. Mon ... County Court and Surrogate Court Term com.
7. Sat .... County Court and Surrogate Court Term ends.
8. SUN ... 17*th Sunday after Trinity.*
9. Mon ... York and Peel Assizes.
15. SUN... 18*th Sunday after Trinity.*
18. Wed.... *St. Luke.*
22. SUN ... 19*th Sunday after Trinity.*
28. Sat. ... *St. Simon and St. Jude.*
29. SUN ... 20*th Sunday after Trinity.*
31. Tues... All Hallow Eve.

## NOTICE.

*Owing to the very large demand for the* Law Journal *and* Local Courts' Gazette, *subscribers not desiring to take* both *publications are particularly requested at once to return the back numbers of that one for which they do not wish to subscribe.*

THE

# Upper Canada Law Journal.

OCTOBER, 1865.

## LAW BILLS OF THE SESSION.

Whatever may be said of the results of the sitting of the assembled wisdom of the land in a political way, with which, however, we have nothing to do, it cannot be denied that some very important measures affecting property and civil rights have been added to the Statute Book, during the session of Parliament that has just closed.

Of these acts the most prominent are the Registry Act, the Act for quieting titles to real estate, and the Act to amend the law of property and trusts. Of the first it is needless to say much; it has been before the profession and the public for a long time, and the alterations now effected in the law of registration of titles to real estate, have been fully considered and are known doubtless to most of our readers. Withont spinning out at the accustomed length, the arguments in favor of registration generally, we are nevertheless glad to notice every step towards a complete and stringent carrying out of the system which prevails in this country with reference to titles. And in this connection we direct attention to the letter which appears in another place, as to the advisability of providing some means of supplying the link which is occasionally found wanting in a chain of title, owing to the want of registration of the title of heirs. It would be a difficult thing perhaps to manage, but a little discussion and thought may eliminate the necessary inspiration. A very important judgment has just been given in the Court of Queen's Bench, in *Robson* v. *Waddell*, which decides that the description of the addition of the subscribing witness in a memorial, was essential to the validity of the registration. There had been a foreshadowing of this decision, and greater caution has of late years obtained amongst conveyancers in consequence; but we rather think that under it, half the titles in the country would be found more or less defective, if the matter remained in that position; but this judgment remained in abeyance, and was not given until a remedy had been provided by the Legislature, which is done by section 78 of the late act, which reads as follows:

"No registration of any deed or other instrument heretofore made shall be deemed or adjudged void by reason of the name or names, residence or residences, addition or additions of the witness or witnesses to such deed or instrument being improperly given or described in the registered momorial thereof, or being either in part or altogether omitted from such memorial, or by reason of any clerical error or omission of a formal or technical character therein; and all registrations heretofore effected in separate registry books of unincorporated villages, are hereby confirmed when the law has been otherwise complied with, and such separate registry books shall be taken and held to form a part of the registry books of the municipality of which such unincorporated village forms a part: provided always, that this clause shall not affect any case or cases now proceeding in any of the courts of law or equity in Upper Canada."

The Registry Act, for all purposes which concern the profession in general, comes into force on the first day of January next.

The Act for quieting titles has already been referred to at length in this journal.* It now remains to be seen how it will work. Chancery men who have lately been complaining of the reduction of their fees, will have the consolation of knowing that the operation of this act is peculiarly within the precincts of their court. We publish a copy of this act, as well as the rules promulgated by the judges of the Court of Chancery under it. With these two acts in full working order, there should be no

* Page 114, *ante.*

reason for any difficulty in the transfer of landed interests in Upper Canada; and it is refreshing to see the premonitory symptoms of a "move" in property, under the genial influence of the bountiful harvest, with which a kind Providence has this year blessed us.

We have next a curious gathering of several excellent provisions under the head of "An act to amend the law of property and trusts in Upper Canada." The first four sections are placed under the head of "Leases," and are intended to restrict, in certain cases, the operation of the rule of law respecting licenses to do acts which without such license would create a forfeiture or give a right to re-enter, to the specific breach or the particular part of the property, &c., to which the permission or waiver is actually intended to extend. Sections 5 to 9 inclusive refer to the breach of covenants to insure against loss by fire. The act also provides for the release from a rent-charge on part of a hereditament charged. It permits a deed which is executed and attested in the ordinary manner, to be a valid execution of a power of appointment by deed, so far as such execution and attestation is concerned. It makes provisions respecting the sale of timber, &c., under a power of sale, and the sale of property charged with the payment of any debt, by a testator, &c. Section 19 enacts that any person shall have power to assign personal property, including chattels real, directly to himself and another or other persons or corporation, by the like means as he might assign the same to another. Section 20 provides a punishment for frauds on sales and mortgages. Powers of attorney in general, and powers of attorney executed by married women for the sale or conveyance of real estate to which she is entitled, or authorizing an attorney to bar dower, in particular, come in for their share of legislation; and the old difficulty of the death of the donor of the power, without the knowledge of the attorney, is removed. Sections 25 to 29 refer to the distribution of assets. Section 30 refers to limitation in intestacy, which does not come into force until 1st of January next. Section 31 enables any trustee, executor, or administrator, without the institution of a suit, to apply by petition, certified by counsel, to any Judge of the Court of Chancery, in chambers, for the opinion, advice, and direction of the Judge on any doubtful point connected with the management of the trust estate. By section 32, every deed or will creating a trust shall, without prejudice to the clauses actually contained in it, be deemed to contain the usual clause limiting the liability of trustees, which is set out at length. This discursive but most useful act winds up with a provision respecting the satisfaction of mortgages charged on lands as to which no direction is given by the will of the owner.

The act amending the Insolvent Act of 1864 was passed this session, and is given in full in another place, as well as some other enactments for which we make room, some of them in this number and some in the *Local Courts' Gazette*, namely, "An Act in reference to the qualification of Justices of the Peace," the origin of which was the decision of the Court of Queen's Bench in *Herbert qui tam* v. *Dowswell*, 24 U. C. Q. B. 427; "An act to regulate the costs of arbitration;" An act to extend the act to impose duties on bills and notes to all notes and bills of whatever amount;" "An act to amend the master and servants' act;" "An Act to declare valid certain sales of lands in Upper Canada;" "An act to repeal the fifth sub-section of the Attorney's act;" "An act to prevent County Judges acting as conveyancers;" and "An act amending the Division Courts, so far as relates to the establishment of new divisions," &c.

Aliens have by degrees been placed more upon a footing with native-born subjects, so far as property is concerned; and an act of this session gives them further privileges, by enacting that the real estate of any alien dying intestate shall descend and be transmitted as if the same had been the real estate of a natural-born or naturalised subject of the Queen.

The march of intelligence may be further noticed in the passage of the act for abolishing the punishment of death in certain cases. For few if any of the crimes mentioned in the act is the death penalty now inflicted. If it is inexpedient that the punishment provided by law should be awarded, why have such punishments in the statute books?—and this, irrespective of the graver question, whether the extreme penalty of death is in any case consonant with sound reasoning, or necessary for the prevention of those crimes for which it may

still be inflicted. A motion was made in the House of Assembly, when this bill was under discussion, to have executions conducted privately within the prison walls, but the motion was withdrawn. There has been much said lately by able men in England, as well in reference to conducting executions in private as to the abolition of the death penalty altogether, but no satisfactory conclusion appears as yet to have been arrived at on either point. Public opinion seems to be divided as to whether such a punishment answers the purposes intended in such a manner as to legitimatize the depriving a human being of the life which the Almighty has given him, a proceeding which can only be excused on the ground of absolute necessity. This is, however, too important a matter to enter into at present, and any change in the law would only be warranted after a full discussion and a thorough investigation of facts and statistics.

We have also an act to amend the act of the previous session, respecting short forms of mortgages.

Besides the enactments referred to, there are several acts of general interest, though not coming strictly within the definition of law bills, such as the act as to stamps on notes and bills, already referred to; an act to authorize the formation of co-operative associations; an act to provide more fully for the punishment of the crime of kidnapping; an act to secure to wives and children the benefit of assurances on the lives of their husbands and parents; an act for the further improvement of grammar schools; and finally, two acts which we are glad to notice, though not law bills at all, but designed for the special benefit of farmers generally—an act to prevent the spread of Canada thistles, and an act to provide for the protection of sheep from dogs, &c.

## DUNKIN'S ACT.

We notice that in several localities in Upper Canada, county and township votes are about to be taken, with a view of introducing the prohibitory provisions of the Temperance Act of 1864, otherwise known as "Dunkin's Act." We have already alluded* to some of the general provisions of this Act, which are intended for the prevention of drunkenness and for the protection of the wives, families and property of habitual drunkards generally. These enactments are theoretically good, so far as they go. The difficulty, as we before suggested, will probably lie in the working of them. As to the provisions for local prohibition, we entertain strong doubts as to the possibility of preventing the sale of intoxicating liquors by any legislative enactment of this kind, and more particularly so in the present divided state of public opinion on the subject. One of the worst things that can happen to a country is familiarizing the minds of the inhabitants with a systematic violation of the laws. Nothing weakens the force of a law so much as the knowledge that it can be broken with impunity, in fact it may almost be asserted that it is better to have no law at all than one which can be easily evaded or which cannot be enforced.

The sin of intemperance, however, is general, and some assert on the increase, and any course which the majority of a community think will check the evil should be tried; but only as an experiment, for, as we have just remarked, "the cure may be worse than the disease." But the voice of the majority should prevail; not the opinion of a few well meaning but in some cases mistaken enthusiasts, who, fully impressed with the evils of intemperance, do not care to think of the consequences which may result from their hasty, one-ideaed attempts to suppress it, and are not sufficiently conversant with human nature or sufficiently liberal in their ideas to form a correct opinion as to whether such attempts are likely to be successful.

In what some people call "the good old days," drunkenness was not considered either criminal or disgraceful even amongst the more intelligent and educated classes of the community. By degrees, however, the enlightenment of christianity and cultivated intellect prevailed, until the drunkard has at length come to be generally considered as despicable and a disgrace to humanity. This feeling is, for the reasons already given, stronger as we ascend in the social scale; but it has not yet descended to those who compose the class most strongly imbued with the vice of intemperance. The public opinion which operates so beneficially upon the higher classes has but little effect upon those for whom a cure is principally required.

* 1 L. C. G. 36.

The conclusion which may be drawn from this is, that some means should be devised which would bring forcibly before the intemperate the disgrace which attaches to the name of a drunkard. We may ask, would not a law which would make intemperance disgraceful in the eyes of all, and make the habitual drunkard contemptible, and which would place him on a level with a dangerous idiot, have a more salutary effect in suppressing this vice than a prohibitory law which we do not at present think can or will be rigorously enforced. Try what would be the effect of depriving the person adjudged to be an habitual drunkard of the rights of citizenship. Deprive him of all power to contract debts or to do any legal act respecting his property (if he has any) or place it in the hands of a committee, and disable him from voting at Parliamentary and municipal elections.

There is, however, a class too low to be reached by any of these means, who would have to be punished in a more open way: in some way, the disgrace of which would be more patent to them—as, for instance, putting them in the stocks, or, as is done in some European countries, compel them to go through the street with a drunkard's badge on, or with the head showing through the top of a barrel, or by inflicting any other punishment which would render them ridiculous; and, if it is thought advisable, punish also in some such way the person convicted of giving liquor to the drunkard. We commend these remarks to those who are earnestly endeavoring, with often but scant assistance, to remedy a great social evil.

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The case of the *Commercial Bank* v. *The Great Western Railway Company*, has been heard before the Privy Council in England, and the appeal been dismissed with costs. The rule therefore for a new trial obtained by the defendants, and against which the plaintiffs appealed, stands. The case will probably come on for trial at the next assizes at Kingston. This appeal, it is said, will cost the Commercial Bank the nice little sum of $10,000, or thereabouts.

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We are sorry to chronicle the sudden death of Dr. Ham, of Whitby, a well known and respected member of the profession. He died on the 30th September, at the age of 51 years.

## JUDGMENTS.

### *QUEEN'S BENCH.*

Present:—DRAPER, C. J.; HAGARTY, J.; MORRISON, J.

Monday, September 25, 1865.

*Robson* v. *Waddell.*—*Held*, that under the old registry act the description of the addition of the subscribing witnesses in the memorial was essential to the validity of the registration. Rule absolute to enter verdict for plaintiff.

*Wilson* v. *Voght.*—Appeal dismissed with costs.

*Randall* v. *Burton.*—Judgment for defendant on demurrer, with leave to apply to a judge in Chambers for leave to amend.

*Dundas* v. *Johnston.*—Rule discharged.

*Miller* v. *McGill.*—Rule absolute to enter verdict for plaintiff.

*Lossee* v. *Murray.*—Judgment for demandant on demurrer.

*Brown* v. *Lewis.*—Rule absolute for new trial on payment of costs.

*Short* v. *Permet.*—Appeal dismissed with costs.

*Bowes* v. *Clancy.*—Appeal dismissed with costs.

*Craig* v. *Great Western Railway Co.*—Appeal allowed.

*Briggs* v. *Grand Trunk Railway Co.*—Judgment for defendants on demurrer, with leave to to apply to amend.

*Corporation of Longueuil* v. *Cushman.*—Rule discharged.

*Tucker et al.* v. *Phillips.*—Rule discharged.

*The Queen* v. *Joseph Cowan.*—Rule absolute for new trial.

*Dickson* v. *Crabb.*—Rule discharged.

*Lawrie et al.* v. *McCallum.*—Rule discharged.

*Chater* v. *McMahon.*—Appeal dismissed with costs.

*Bates* v. *Great Western Railway Co.*—Judgment for defendants on demurrer, with leave to apply to a judge in Chambers for leave to amend.

*In the matter of the Township of Hartley and the Township of Emily.*—Rule absolute to quash by-laws with costs, there having been voting on a temperance by-law and no one presiding at the meeting.

*In re Forrester and Township of Ross.*—Rule discharged with costs.

*In re Valentine and the County of Bruce.*—Proceedings stayed by Act of Parliament.

*Stewart* v. *Kay.*—Judgment for demandant.

*D'Arcy* v. *White.*—*Held*, that in an action of ejectment against two defendants, one of whom allowed judgment by default, a judgment and writ for costs against both is regular. Rule discharged with costs.

*Hibbert* v. *Scott.*—Rule discharged.

*Moffatt* v. *Barnard.*—Rule absolute to enter nonsuit.

*Hodge* v. *Barnard.*—Rule absolute to enter nonsuit.

*Blackburn* v. *Stewart.*—Rule discharged.

*Baby* v. *Langlois.*—Rule discharged with costs.

*Lowry et al* v. *Lowry.*—Rule absolute for new trial on payment of costs.

Saturday, September 30, 1865.

*Dowker* v. *Canada Life Assurance Co.*—Rule absolute.

*Reid* v. *Miller.*—Rule discharged.

*In the matter of Fanny Lett and the Commercial Bank of Canada.*—Appeal allowed, and rule to be made absolute in the court below, costs to abide the event.

*Widder* v. *Buffalo and Lake Huron Railway Co.*—Rule absolute to set aside verdict without costs. Leave to appeal granted.

*Ontario Bank* v. *Muirhead.*—Rule absolute to set aside *fi. fa.* lands.

*Ontario Bank* v. *Kirby et al.*—Rule absolute to set aside *fi. fa.* lands.

## *COMMON PLEAS.*

Present:—Richards, C. J.; Adam Wilson, J.; John Wilson, J.

Monday, September 25, 1865.

*Becher* v. *Woods.*—*Postea* for plaintiff for south half 15, and for defendant as to south half 14.

*Provincial Insurance Co.* v. *Watson.*—Rule refused.

*Nolan* v. *Coe.*—Rule discharged.

*Kyle* v. *The Buffalo and Lake Huron Railway Co.*—Rule absolute to enter verdict for defendant on the third count, and discharged as to residue without costs to either party on this rule, the parties agree in the meantime to reduce verdict.

*Ogilvie* v. *McRory.*—*Held*, that a judge at *nisi prius* has power under sec. 222 of C. L. P. A. to amend the record by addition of the parties, if amendment necessary to the determination of the real question in controversy between the parties. Rule discharged.

*Turley* v. *Williamson.*—Rule discharged.

*Stephens* v. *Berry.*—*Held*, that a bill drawn in Chicago upon a party in Canada, payable in New York requires a Canadian stamp. That a party availing himself of our law by placing double stamps on it must do so before action, and *quære*, should he not do so within a reasonable time after becoming a party to the bill? Rule to increase the damages discharged, and rule absolute to enter nonsuit.

*McCallum* v. *McKinnon.*—Judgment for plaintiff on demurrer, with leave to apply to a judge in Chambers to amend.

*Fisher* v. *Berry.*—Rule absolute for new trial without costs.

*Leatherman* v. *Trow.*—Rule absolute for new trial on payment of costs in three weeks.

*Friel* v. *Ferguson.*—*Held*, that a justice of the peace acting without jurisdiction, or in cases of excess of jurisdiction, is not entitled to notice of action. Rule discharged. Leave to appeal refused.

*Pyper* v. *McKay.*—Judgment for defendant on demurrer to fourth and fifth pleas.

*Gilmore* v. *Grand Trunk Railway Co.*—Appeal allowed and rule absolute to enter nonsuit in court below.

*Harrington* v. *Murray.*—Rule discharged without costs.

*Canada Permanent Building Society* v. *Harris.* Judgment for plaintiff on demurrer to plea.

*Kerr* v. *Kinsey*—Rule discharged.

*Ontario Bank* v. *Kirby.*—Rule discharged with costs.

*Glennie* v. *Ross.*—Rule discharged.

*In re Wallace and the Corporation of Halton.*—Rule absolute with costs.

Saturday, September, 30, 1865.

*Corporation of Thurlow* v. *Bogart.*—Upon plaintiffs consenting to a verdict for defendant on issues to 1st count, verdict to stand for plaintiffs for $20 on 2nd count and rule to be discharged.

*Harrold* v. *The Counties of Simcoe and Ontario.*—*Held*, that the corporations of the counties of Simcoe and Ontario are liable for the defective state of the bridge over "The Narrows," whereby plaintiff fell and sustained injuries. Rule discharged. Leave to appeal granted.

*Diamond* v. *McAnany.*—Unless plaintiff consent to reduce his verdict by $200 on 1st count of the declaration, with an order for full costs, rule to be absolute for new trial without costs.

*Burns* v. *Cox.*—Stands.

*Bond* v. *Bond.*—Plaintiff's rule absolute for a new assessment and for amendment of declaration by striking out third breach on payment of costs, and defendant's rule discharged with costs.

*City Bank* v. *Macdonald.*—Stands with a view to a settlement between the parties.

*Kitchen* v. *Murray.*—Rule discharged, with costs.

*Crooks* v. *Dickson.*—Rule discharged, with costs.

*Smart* v. *Miller.*—Stands.

*In re David Lee et al.*—Judgment declaring the rights of the parties, and upon filing an affidavit of service on Ann Barker an order to go to the real representative for partition or sale.

## IN THE COURT OF QUEEN'S BENCH AND COURT OF COMMON PLEAS.

### Regulæ Generales.

*Trinity Term, 29th Victoriæ.*

The Rules of Court, under the head of "New Trial List," numbers One, Two, Three, Four, Five, Six, Seven, Eight, Nine, Ten, Eleven and Twelve, passed in Michaelmas Term, 27th Victoriæ, shall be, from and after the first day of Michaelmas Term next, annulled, and the following Rules shall come into force and take effect upon and after the first day of Michaelmas Term next.

NEW TRIAL LIST.

1. The party who obtains any rule *nisi* for a new trial, or for entering a non-suit or a verdict, or for increasing or reducing a verdict on leave reserved, may, on or after the fourth day, inclusive, after the serving such rule, file the same, together with an affidavit of service, with the Clerk of the Court granting such rule.

2. The party served with any such rule may, (if the same has not been already filed by the party who obtained the same) on or after the fifth day after the granting of the rule, file the copy served, with an affidavit of the fact and time of such service, with the Clerk of the Court granting such rule.

3. In case the party to whom any such rule is granted shall neglect or delay to draw up and serve the same, the opposite party may, on or after the third day after the granting such rule, and upon filing with the Clerk an affidavit that the rule has not been served, enter a *ne recipiatur* with such Clerk, after which the Clerk shall not receive or enter such rule in the book hereafter required to be kept by him, and such rule shall be deemed to be abandoned, and the opposite party may proceed as if no such rule had been moved for or granted.

4. The Clerk shall, immediately on the receipt of any rule or copy, under the first or second Rules, enter a memorandum thereof in a book to be kept for that purpose in the order in which the same shall be delivered to him, such memorandum to be according to the form following:—

——————*Term*, (year).

| Plaintiff's Name. | Defend't's Name. | Descript'n of Rule. | When filed with the Clerk. | How disposed of. |
|---|---|---|---|---|

5. On the first Saturday, the second Tuesday, and the second Friday of every Term, the Court of Queen's Bench, after going through the Bar to hear motions for rules *nisi* or motions of course, will hear the rules so entered, according to the order in which they stand, in preference to any other business; and on the first Friday, second Monday, and second Wednesday of every Term, the Court of Common Pleas will, after going through the Bar to hear motions for rules *nisi* or motions of course, hear the rules so entered according to the order in which they stand, in preference to any other business. The causes to be heard each day to be those on the list as it stands at the opening of the Court.

6. Each Court, in its discretion, will hear any rule so entered when both parties are present and prepared to proceed.

7. If, when a rule is called on in its proper order, the party who obtained the same does not appear to support it, and the opposite party attends and applies to have it discharged, such rule may be discharged accordingly.

8. If the party called upon to shew cause does not appear when the rule is called on in its proper order, the Court will hear the other side, *ex parte*, and dispose of the rule.

9. If neither party appear, the rule may, in the discretion of the Court, be treated as having lapsed, and be struck out of the Clerk's books.

10. In the absence of other business, the Courts may, in their discretion, hear Rules so entered on any other days during Term besides those mentioned in the fifth Rule, the parties to the Rule being present and desirous to proceed.

11. Each Court will, on sufficient ground shown upon affidavit, enlarge a Rule so entered to a subsequent day in the same Term, or to the following Term, and the Clerk shall alter the entry accordingly, and place the enlarged Rule at the foot of the list.

12. All Rules entered by the Clerk as aforesaid, which remain unheard at the end of any Term, shall be enlarged as of course, on filing a motion paper to that effect, to the following Term, and shall be forthwith re-entered in the Clerk's book, in the order in which they then stand, for hearing in the next ensuing Term.

13. The Court may, nevertheless, in any case, if it shall see fit so to do, make any special rule or order, or give any special direction upon or with respect to any such Rule, or the entering, taking out, or service thereof, or with respect to any supposed lapse or abandonment thereof or otherwise, as it might have done before the passing of these or the rescinded Rules.

Dated 9th September, A.D. 1865.

(Signed) Wm. H. Draper, *C. J.*
Wm. B. Richards, *C.J.C.P.*
John H. Hagarty, *J.Q.B.*
Jos. C. Morrison, *J.Q.B.*
Adam Wilson, *J.C.P.*
John Wilson, *J.C.P.*

## ORDERS OF THE COURT OF CHANCERY UNDER ACT FOR QUIETING TITLES.

[September 19, 1865.]

1. Under the Act for quieting titles to real estate in Upper Canada, the petition for investigation of title shall not include two or more properties dependent on separate and distinct titles; but may include any number of lots or parcels belonging to the same person, and dependent on one and the same chain of title.

2. Where a petition is filed under the said Act, the Registrar is to deliver to the party filing the same a certificate of the filing thereof for registration in the proper county; and thereupon the petition is forthwith to be referred and delivered by the Registrar to such officer of the court or other referee as shall from time to time be designated by the court for that purpose.

3. Such officer or other referee is to be called the Referee of Titles.

4. The particulars necessary under the Act to support the petition are to be delivered by the petitioner or his solicitor to the referee of titles, and are to be forthwith examined and considered by him.

5. Where the application is under the second section of the Act, the referee of titles, on receiving the petition, is to attend the presiding Judge in Chambers with the same for directions as to proceeding therewith.

6. In any case under the first section of the Act, and in any case which the Judge authorizes to be proceeded with under the second section of the Act, if, on such examination as aforesaid, the referee finds the proof of title defective, he is to deliver or mail to the petitioner, or to his solicitor or agent, a memorandum of such finding.

7. When the referee finds that a good title is shown, he is to prepare the necessary advertisement for the Canada Gazette, and to endorse thereon a memorandum of the other newspaper or newspapers, if any, in which he thinks it proper to have the same inserted, and the number of insertions to be given thereto in the Gazette and other newspaper or newspapers, respectively.

8. Any notice of the application to be served or mailed under the fourteenth section of the Act, is to be prepared in like manner; and directions are in like manner to be given as to the persons to be served with such notice, and as to the mode of serving the same.

9. The referee is, from time to time, to confer with one of the judges in respect of the matters before the referee, as there shall be occasion.

10. Where there is no contest, the attendance of the petitioner, or of any solicitor on his behalf, is not to be required on the examination of the title, except where, for any special reason, the referee directs such attendance.

11. But in case the petitioner is dissatisfied with any finding or direction of the referee, he may apply to him to review and alter the same, and is to be entitled to an appointment for discussing the same before the referee; and an appeal will lie to the court from any finding or direction which is then made.

12. When any person has shown himself entitled to a certificate or title, or a conveyance under the Act and has published and given all the notices required, the referee is to prepare the certificate of title, or conveyance, and is to sign the same at the foot or in the margin thereof; and is to attend one of the judges with the same, and with the deeds, evidence, and other papers before him, in reference thereto; and on the certificate or conveyance being signed by the judge, the referee is to transmit or deliver the same to the registrar, to be signed and registered by him; and the registrar is to deliver or transmit the same, when so signed and registered, to the petitioner, his solicitor, or agent, for registration in the proper county.

13. When a certificate of title or conveyance under the Act, has been granted, the referee may, without further order, deliver, on demand, to the party entitled thereto, or his solicitor, all deeds and other evidences of title, not including affidavits made, and evidence given in the matter of the title; and is to take his receipt therefor.

14. The fees of solicitors and counsel, and the fees payable by stamps, for proceedings under the said Act, are, respectively, to be the same under like proceedings in other cases.

15. The referee is, in lieu of all other fees, to be entitled to a fee of fifty cents for every deed in the chain of title, other than satisfied mortgages; and to a fee of $2 on the certificate of title, or the conveyance under the Act; and no further or other fee is to be payable to the referee in respect of any of the proceedings by or before him under the said Act, in an uncontested case.

16. In a contested case, the referee is, in addition, to be entitled in respect of the proceedings occasioned by the contest, to the same fees therefor as are payable to the Master or accountant, for the like proceedings in suits.

17. Petitions under the 35th section of the Act are to be filed and proceeded with in the same manner, as nearly as may be, as petitions for an indefeasible title; and the fees of officers, solicitors, and counsel, are to be the same as in respect of the like proceedings in suits.

## ACTS OF LAST SESSION.

### AN ACT FOR QUIETING TITLES TO REAL ESTATE IN UPPER CANADA.

[Assented to 18th September, 1865.]

Whereas it is expedient to give certainty to the title to real estates in Upper Canada, and to facilitate the proof thereof; and also to render the dealing with land more simple and economical: Therefore, Her Majesty, by and with the advice and consent of the Legislative Council and Assembly of Canada, enacts as follows:

1.—Any owner of an estate in fee simple in land in Upper Canada, or any trustee for the sale of the fee simple, shall be entitled to have his title judicially investigated and the validity thereof ascertained and declared; and he shall be so entitled whether he has the legal estate or not, and whether his title is subject or not to any charges or incumbrances.

2.—Any other person who has an estate or interest, legal or equitable, in or out of land in Upper Canada, may also apply for the investigation of his title and a declaration of the validity thereof; but it shall be in the discretion of the Judge by or before whom the proceedings are taken, to grant or refuse the application for the investigation; and such discretion may be invoked and exercised at any stage of the proceedings, and the decision of the Judge in exercising such discretion shall be subject to appeal like any other decision.

3.—The application shall be to the Court of Chancery or any Judge thereof, and may be by a short petition in the form given in the Schedule A.

4.—A certificate by the Registrar of the said Court, of the petition being filed, shall be registered in the Registry Office of the County in which the land lies, and this certificate may be in the form given in Shedule B.

5.—The application shall be supported by the following particulars:

(1.) The title deeds (if any) and evidences of title relating to the land that are in the possession or power of the applicant;

(2.) A certified copy of the memorials of all other registered instruments affecting the land, or of all since the last judicial certificate, if any under this Act, was given (as the case may be), up to the time of the registering of a certificate of the petition as provided for by Section four;

(3.) The certificate of the Registrar of the County in which the land lies, as to bills and proceedings in Chancery or in any County Court on its equity side, relating to the land, and of which a certificate has been registered in his office.

(4.) A concise statement of such facts as are necessary to make out the title, and which do not appear in the produced documents; but no abstract of produced documents shall be required, except on special grounds;

(5.) Proofs of any facts which are required to be proved in order to make out the title, and which are not established by the other produced documents, unless the Judge shall dispense with such proofs until a future stage of the investigation;

(6.) An affidavit or deposition by the person whose title is to be investigated and a certificate of one of his Counsel or Solicitors, to the

(7.) A Schedule of the particulars produced effect hereinafter respectively mentioned, unless the Judge sees fit, for some special reason, to dispense with the same respectively; under the preceding six sub-sections.

6.—The affidavit or deposition of the person whose title is to be investigated, shall state to the effect, that to the best of his knowledge and belief he is the owner of the estate or interest (whatever it is) which is claimed by the petition, subject only to the charges and incumbrances set forth in the petition or in the Schedule thereto, or that there is no charge of incumbrance affecting the land; that the deeds and evidences of title which he produces, and of which a list is contained in the Schedule produced under the preceding section, are all the title deeds and evidences of title relating to the land that are in his possession or power, and that he is not aware of the existence of any claim adverse to or inconsistent with his own to any part of the land or to any interest therein, or if he is aware of such adverse claim, he shall set forth every such adverse claim, and shall depose that he is not aware of any except what he sets forth; and the affidavit or deposition shall also set forth whether any one is in possession of the land, and under what claim, right or title; and shall state that to the best of the deponent's knowledge, information and belief, the said affidavit or deposition, and the other papers produced therewith, fully and fairly disclose all facts material to the title claimed by the petitioner, and all contracts and dealings which affect the same or any part thereof, or give any right as against the applicant.

7.—This affidavit or deposition may, in a proper case, be dispensed with, or may be made by some other person instead of the person whose title is to be investigated, or an affidavit or deposition as to part may be made by the one, and as to part by another, at the discretion of the Judge to whom the application is made; and in such case the affidavit shall be modified accordingly.

8.—The certificate of the Counsel or Solicitor shall state to the effect, that he has investigated the title and believes the party to be the owner of the estate which the petition claims in the land in question, subject only (if such be the case) to any charges or incumbrances that may be set forth in the Schedule to the petition (or that he so believes, subject to any condition, qualification or exemption to be set forth in the certificate), and that he has conferred with the deponent on the subject of the various matters set forth in the affidavit or deposition referred to in the preceding two sections, and believes the affidavit or deposition to be true.

9.—The Judge in investigating the title may receive and act upon any evidence that is now received by any of the Courts on a question of title; and any evidence which the practice of English Conveyancers authorizes to be received on an investigation of a title out of Court; or any other evidence, whether the same be or be not receivable or sufficient in point of strict law, or according to the practice of English Conveyancers, provided the same satisfies the Judge of the truth of the facts intended to be made out thereby.

10.—The proofs required may be by, or in the form of, affidavits or certificates; or may be given *viva voce;* or may be in any other manner or form that under the circumstances of the case is satisfactory to the Judge in regard to the matters to which the same relate.

11.—If the Judge is not satisfied with the evidence of title produced in the first instance, he shall give a reasonable opportunity of producing further evidence, or of removing defects in the evidence produced.

12.—Before giving a certificate or conveyance under this Act, the Judge shall direct to be published in the *Canada Gazette*, and if he sees fit in any other newspaper or newspapers, and in such form and for such period or periods as the Judge thinks expedient, a notice either of the application being made, or of the order or decision of the Judge thereon; and

the certificate of conveyance shall not be signed or executed until after the expiration of at least four weeks from the first publication of such notice, or such other period as the Judge may appoint.

13.—When the Judge is satisfied respecting the title, and considers that the certificate of title can safely be granted without any other notice of application than the published notice so required, he shall grant the certificate accordingly.

14.—In case of there appearing to exist any claim adverse to or inconsistent with that of the Petitioner to or in respect of any part of the land, the Judge shall direct such notice as he deems necessary to be mailed to or served on the adverse claimant, his solicitor, attorney, or agent.

15.—In all cases he may require from time to time any further publication to take place, or any other notice to be mailed or served, that he deems necessary before granting his certificate.

16.—Before a certificate of title is granted, satisfactory evidence shall be given by certificate, affidavit or otherwise, that all taxes, rates and assessments, for which the land is liable, have been paid, or that all except those for the current year have been paid.

17.—Every claim of title under this Act shall be presumed to be subject to the following exceptions and qualifications, unless the petition for investigation expressly alleges the contrary;

(1.) The reservations (if any) contained in the original grant from the Crown;

(2.) Any municipal charges, rates or assessments theretofore imposed for local improvements, and not yet due and payable;

(3.) Any title or lien which, by possession or improvement or other means, the owner or person interested in any adjoining land has acquired to or in respect of the land mentioned in the certificate;

(4.) Any lease or agreement for a lease, for a period yet to run, of not exceeding three years, where there is actual occupation under the same.

18.—But if the applicant desires the certificate to declare the title to be free from the said particulars, or any of them, his petition shall so state, and the investigation shall proceed accordingly.

19.—Any person having an adverse claim, or a claim not recognized in the applicant's petition, may at any time before the certificate of title is granted, file and serve on the applicant, his solicitor or agent, a short statement of his claim, which may be in the form set forth in Schedule C.

20.—This claim shall be verified by an affidavit to be filed therewith.

21.—In case of a contest, the Judge may either decide the question of title on the evidence before him, or may refer the same or any matter involved therein to the full Court, or to any mode of investigation which is usual in other cases, or which he may deem expedient, and may defer granting the certificate until afterwards, according as the circumstances of each case render just and expedient.

22.—The Judge may, at any stage of the cause, order security for costs to be given by the applicant for a certificate, or by any person making any adverse claim.

23.—The Judge may order costs either as between party and party, or as between solicitor and client, to be paid by or to any person, party to any proceeding under this Act, and may give directions as to the fund out of which any costs shall be paid.

24.—The Petitioner may by leave of the Judge withdraw his application at any time before final adjudication, or payment of all costs incurred in the investigation either by himself or by any adverse claimant.

25.—With a view of expediting investigations, and subject to any general orders in this behalf, the Judge, if he sees fit, may refer any petition presented under this Act to the Master or a Deputy Master or any other officer of the said Court, or to any Counsel named by the Judge, and in such case the referee shall proceed as the Judge himself should do under this Act, had the reference not been made, and shall have the same powers.

26.—The Judge may also refer any title to counsel named by the Judge, for a preliminary report or examination, and may call for the assistance of counsel in any other way and for any other purpose that may tend to the dispatch of business under this Act.

27.—The Judge may give one certificate of title, comprising all the land mentioned in the Petition, or may give separate certificates as to the title of separate parts of the land.

28.—The certificate of title may be in the form contained in Schedule D to this Act, and shall be under the seal of the Court, and shall be signed by one of the Judges and by the Registrar of the Court, and the same and the Schedule (if any) thereto, or a duplicate or counterpart of the same, shall be registered in full, both in the Court of Chancery and in the Books of the Registry Office of the County where the land lies, without any further proof thereof.

29.—A memorandum or certificate of the registration may be endorsed on the certificate of title or on any counterpart or certified copy thereof thus:—

"Registered in Chancery.——186—.——Book——, Page——, A. G. Registrar.

Registered in the Registry Office for the County of——, Book——, Page——, (Date) ——Registrar," and a memorandum or certificate so signed shall be evidence of the registration mentioned therein.

30.—The certificate of title when so sealed, signed and registered, shall be conclusive at law and in equity, and the title therein mentioned shall be deemed absolute and indefeasible, from the day of the date of the certificate.

as regards Her Majesty and all persons whatever, subject only to any charges or incumbrances, exceptions or qualifications mentioned therein, or in the Schedule thereto, and shall be conclusive evidence that every application, notice, publication, proceedings, consent and act whatsoever, which ought to have been made, given and done previously to the granting of the certificate, has been made, given and done by the proper parties.

31.—After a certificate of title is duly registered, a copy of a certificate, purporting to be signed and certified as such copy, by the Registrar in Chancery, or by the Registrar for the County in which the land lies, shall be admissible evidence of the certificate for all purposes whatsoever, without further evidence of such copy, and without accounting for the non-propuction of the certificate.

32.—In case of a Chancery sale, the Court of Chancery, if it thinks fit, may investigate the title with a view to granting an indefeasible title, and in that case, a conveyance executed to the purchaser under the seal of the Court, and purporting to be under the authority of this Act, shall have the same conclusive effect as a certificate.

33.—The conveyance may be in the form set forth in Schedule E to this Act.

34.—Where a decree is made for the specific performance of a contract for the sale of an estate, and it is part of the contract that the vendor shall have an indefeasible title, the Court shall make the like investigation, and the conveyance may be in the form set forth in the same Schedule E.

35.—In case any person domiciled in Upper Canada, or claiming any real estate in Upper Canada, desires to establish, not his title to some specific property, but generally that he is the legitimate child of his parents, or that the marriage of his father or mother, or of his grandfather and grandmother, was a valid marriage, or that his own marriage was a valid marriage, or that he is the heir or one of the co-heirs of any person deceased, or that he is the natural born sobject of Her Majesty, he may, if the said Court thinks fit, have any of the said matters judicially investigated and declared.

36.—The application may be by a short petition stating the object of the application.

37.—The petition shall be supported by an affidavit of the applicant verifying the statements of the petition, and stating further that his claim is not disputed or questioned by any person; or if his claim is to his knowledge disputed or questioned, he shall set forth the facts in relation to such dispute or question, and shall depose that he is not aware of any dispute or question, except what he has set forth, and he shall state in the affidavit such other facts as may satisfy the Court of the propriety of proceeding with the investigation.

38.—The investigation shall be made by the same judicial authority and in the same manner, and on the same evidence, and the same publication or other notice shall be required, and the same proceedings generally shall be had, and the certificate granted on such investigation shall be registered in the same way, and may be proved by the same ovidence, as nearly as may be respectively, as in cases under the first section of this Act.

39.—This certificate when registered shall be conclusive and indefeasible in favor of the party on whose application the same was granted, and all persons claiming by, from, through or under him, and shall be *prim facie* evidence in favor of all other persons, and against all persons of the truth of the fact therein declared.

40.—A separate book shall be kept in Chancery for the registering of these and other certificates of title, and conveyances given under this Act, and the certificates and conveyances registered therein shall be numbered in order, and convenient indexes to the books shall be kept in such form as the Court from time to time directs.

41.—In case any person who, if not under disability, might have made any application, given any consent, or done any act, or been party to any proceeding under this Act, is a minor, an idiot or a lunatic, the guardian of the minor, or committee of the estate of the idiot or lunatic may make such application, give such consent, do such act and be party to such proceeding as such person might, if free from disability, have made, given, done or been party to, and shall otherwise represent such person for the purposes of this Act; and if the minor has no guardian, or the idiot or lunatic no committee of his estate, the Court or Judge may appoint a person with like power to act for the minor, idiot or lunatic; but a married woman shall, for the purposes of this Act, be deemed a feme-sole.

42.—After a certificate is granted in regard to any of the matters investigated under this Act, any party aggrieved thereby may, on petition, and after satisfactorily accounting for his delay, have the title or claim re-investigated on such terms as may be just.

43.—But no proceeding on such petition shall affect the title of any person who, in the meantime, and after the registration of the certificate, shall have acquired, by sale, mortgage or contract, for valuable consideration, any estate or interest in the land specified in the certificate of title; or (in case the certificate was under the thirty-fifth section of this Act) in any land or other property, the title to which was derived from, through or under the person named in the certificate, in the character which is thereby declared to belong to him.

44.—Proceedings under this Act shall not abate or be suspended by any death or transmission or charge of interest, but in any such event the Court or Judge may require notices to be given to persons becoming interested, or may make any order for discontinuing, or suspending, or carrying on the proceedings, or

otherwise in relation thereto, as under the circumstances may be just.

46.—No petition, order, affidavit, certificate registration or other proceeding under this Act shall be invalid by reason of any informality or technical irregularity therein, or of any mistake not affecting the substantial justice of the proceeding.

46.—An appeal shall lie from an order or decision of a Judge under this Act to the full Court, and from the full Court to the Court of Error and Appeals, as in the case of Orders, Decrees, Rules and Judgments, in suits.

47.—The foregoing provisions of this Act shall be so construed and carried out, as to facilitate, as much as possible, the obtaining of indefeasible titles by the owners of estates in land, through the simplest machinery, at the smallest expense, and in the shortest time, consistent with reasonable prudence in reference to the rights or claims of other persons.

48.—If in the course of any proceeding under this Act, any person acting either as principal or agent, shall, knowingly and with intent to deceive, make, or assist or join in or be privy to the making of any material false statement or representation, or suppress, conceal or assist or join in or be privy to the suppressing, withholding or concealing from the Court any material document, fact or matter of information, every person so acting shall be deemed to be guilty of a misdemeanor, and on conviction shall be liable to be imprisoned in the Provincial Penitentiary for a term not exceeding three years, and not less than two years, or to be imprisoned in any other prison or place of confinement for any term less than two years, and in the latter case with or without hard labor, or to fined such sum as the Court by which he is convicted shall award; any order or declaration of title obtained by means of such fraud or falsehood, shall be null and void for or against all persons other than a purchaser for valuable consideration without notice.

49.—If in the course of any proceeding before the Court, under this Act, any person shall fraudulently forge or alter, or assist in forging or altering any certificate or other document relating to such land or the title thereto, or shall fraudulently offer, utter, dispose of or put off any such certificate or other document, knowing the same to be forged or altered, such person shall be guilty of felony, and upon conviction shall be liable, at the discretion of the Court by which he is convicted, to be imprisoned in the Provincial Penitentiary for life or for any term not less than three years, or to be imprisoned in any other prison or place of confinement for any term not exceeding two years, and in the latter case with or without hard labor.

50.—No proceeding or conviction for any act hereby declared to be a misdemeanor, shall affect any remedy which any person aggrieved by such act may be entitled to, either at law or in equity, against the person who has committed such act.

51.—Nothing in this Act shall entitle any person to refuse to answer any question or interrogatory in any civil proceeding in any Court of law or equity, but no answer to any such question or interrogatory shall be admissible in evidence against such person in any civil proceeding.

52.—The said Court may, from time to time, make general orders for referring all or any applications under this Act, to any master, deputy-master or other officer of the Court, or to any Counsel or other person appointed by the Court in that behalf, and to regulate the fees to be paid on such reference, and the referee shall have the same powers as a Judge within the limits prescribed by such general orders; and the Court may also from time to time, make other general orders for the purposes of this Act, and for regulating the practice under the same; and all general orders made in pursuance of this section may from time to time be rescinded or altered by the said Court.

## SCHEDULE A.

IN CHANCERY.

*Form of Petition for the investigation, sec. 3.*

In the matter of (*the East half of lot No.—— in the —— concession in the township of—— or as the case may be, describing the property very briefly.*)

To the Honorable the Judges of the Court of Chancery:—

The Petition of —— ——

Sheweth,—

That your petitioner is absolute owner in fee simple in possession (*or as the case may be*), of the following property (*describing it*).

That there is no charge or other incumbrance affecting your petitioner's title to the said land (*except, &c., or,—that your petitioner's title is subject only to the charges or incumbrances in the schedule hereto mentioned, and that the only persons having or claiming any charge, incumbrance, estate, right or interest in the said land are set forth in the schedule hereto annexed, and that the charge, incumbrance, estate, right or interest belonging to or claimed by each is therein set forth.*) Your petitioner therefore prays that his title to the said land may be investigated and declared under the Act for quieting titles to real estate in Upper Canada.

(Signed,) A. B.
or C. D., Solicitor for A. B.

## SCHEDULE B.

*Form of Registrar's Certificate of an Application under this Act, sec. 4.*

I certify that an application has been made by —— to the Court of Chancery, under the Act for quieting titles to real estate in Upper

Canada, for a certificate of title to the following lands (*stating them*).

Alex. Grant,
*Registrar.*

SCHEDULE C.

*Form of an Adverse Claimant's Statement, Sec.* 19.

In the matter of, &c. (*as in petition*).

A. B. of, &c., claims to be the owner of the said land, &c., &c. (*stating very briefly the nature of the claim and the grounds of it*). Dated this —— day of —— 186—.

(Signed,) A. B.,
or C. D., Solicitor for A. B.

SCHEDULE D.

*Form of Chancery Certificate of Title, sec.* 28.

No. ——

These are to certify under the authority of the Act for quieting titles to real estate in Upper Canada, that A. B. —— is the legal and beneficial owner in fee simple in possession (*or as the case may be,*) of all, &c., (*here describe the property,*) subject to the reservations mentioned in the seventeenth section of the said Act and therein numbered respectively one, two, three and four (*or as the case may be*), and to (*specifying either by reference to a schedule or otherwise any of the other charges or incumbrances, exceptions, or qualifications to which the title of A. B. is subject*) but free from all other rights, interests, claims and demands whatever. Or that (*stating the facts found and dectared under the thirty-fifth section of this Act, and stating on whose application the same are declared.*)

In witness whereof —— (*Chancellor or one of the Vice-Chancellors,*) of the said court, has hereunto set his hand, and the seal of the said court has been hereunto affixed, this —— day of ——.

A. Grant, C. D. L. S.
*Registrar.*

SCHEDULE E.

*Form of Chancery Deed, secs.* 33 *and* 34.

No.——

The Court of Chancery for Upper Canada, under the authority of the Act for quieting titles to real estate in Upper Canada, doth hereby grant unto A. B. &c. (*here describe the premises sold*), to hold the same unto the said —— his heirs and assigns for ever (*or as the case may be*), subject to (*here specify as in the case of a Chancery certificate of title*).

In witness whereof —— (*Chancellor or one of the Vice-Chancellors of the said Court*), has hereunto set his hand, and the seal of the said court has been set, this —— day of —— in the year of our Lord, ——

A. Grant, C. D. L. S.
*Registrar.*

An Act to amend the Insolvent Act of 1864.

[Assented to 18th September, 1865.]

Whereas, it is expedient to amend the Insolvent Act of 1864, in the particulars hereinafter set forth; Therefore, Her Majesty, by and with, &c., enacts as follows:

1.—Every Assignee appointed under a Deed of Assignment shall immediately give notice thereof by advertisement. (Form D, appended to the said Act.)

2.—A voluntary assignment may be made to any official assignee appointed under the said Act, without the performance of any of the formalities, or the publication of any of the notices required by subsections one, two, three and four of section two of the said Act.

3. The following shall be added to, and shall be read and construed as forming part of subsection *a* of section three, that is to say: "or if, being a trader, he permits any execution issued against him under which any of his chattels, land or property are seized, levied upon or taken in execution, to remain unsatisfied till within forty-eight hours of the time fixed by the Sheriff or officer for the sale thereof; subject however to the privileged claim of the seizing creditor of the costs of such execution, and also to his claim for the costs of the judgment under which such execution has issued; which shall constitute a lien upon the effects seized, or shall not do so, according to the law as it existed previous to the passing of this Act, in the section of this Province in which the execution shall issue."

4.—In Upper Canada, if the defendant, in any process for compulsory liquidation, absconds from the Province, or remains without the Province, or conceals himself within the Province, service of the Writ of Attachment issued against him under the said Act, may be validly made upon him in any manner which the Judge may order, upon application to him in that behalf.

5.—If the Sheriff or officer charged with any writ of attachment, is unable to obtain access to the interior of the house, store, or other premises of the defendant named in such writ, by reason of the same being locked, barred or fastened, such Sheriff or officer shall have the right forcibly to open the same.

6.—In proceedings for compulsory liquidation, concurrent Writs of Attachment may be issued, if required by the plaintiff, addressed to the Sheriffs of districts or counties other than that in which such proceedings are being carried on.

7.—No declaration shall hereafter be required in proceedings for compulsory liquidation, and such proceedings shall not be contested either as to form or upon the merits, otherwise than by summary petition, as provided by sub-section twelve of section three of the said Act.

8.—Writs of attachment in proceedings for compulsory liquidation may be made returnable after the expiry of five days from the ser-

vice thereof, where the defendant resides in this Province, and not more than fifteen miles from the place of return; and one additional day for every additional distance of fifteen miles between such residence, if in this Province, and such place of return.

9.—The guardian appointed under a writ of attachment shall have the right in his own name, and in his capacity as such guardian —but only after having obtained an order of the Judge to that effect, upon cause shewn, to institute any conservatory process that may be necessary for the protection of the estate.

10.—If, pending proceedings for compulsory liquidation, the insolvent should make a voluntary assignment of his estate and effects, in conformity with the provisions of the said Insolvent Act of 1864 and of this Act, the assignee under such assignment may apply for and obtain from the Judge an order to stay such proceedings, subject to the claim of the plaintiff for payment, out of the estate, of the costs incurred in such proceedings.

11.—If a writ of attachment issue against any trader, by reason of the neglect of such trader to satisfy a writ of execution against him as hereinbefore provided, and such trader shall petition to set aside such writ of attachment, it shall be sufficient for him to shew upon such petition that such neglect was caused by a temporary embarrassment, and that it was not caused by any fraud or fraudulent intent, or by the insufficiency of the assets of such trader to meet his liabilities.

12.—The operation of the seventh sub-section of section two, and of the twenty-second sub-section of section three of the said Act, shall extend to all the assets of the insolvent, of every kind and description, although they are actually under seizure under any ordinary writ of attachment, or under any writ of execution, so long as they are not actually sold by the Sheriff or Sheriff's officer under such writ. This clause shall not apply to any writ of execution now in the hands of the Sheriff. But the rights, liens and privileges of the seizing or attaching creditor, for his costs upon any such writ, shall be the same as they were previous to the passing of this Act, in the section of this Province in which such writ shall issue.

13.—No lien or privilege upon either the personal or real estate of the insolvent shall be created for the amount of any judgment debt, or of the interest thereon, by the issue or delivery to the Sheriff of any writ of execution, or by levying upon or seizing under such writ, the effects or estate of the insolvent; unless such writ of execution shall have issued and been delivered to the Sheriff at least thirty days before the execution of a deed of assignment, or the issue of a writ of attachment, under the said Act; but this provision shall not apply to any writ of execution heretofore issued and delivered to the Sheriff, nor affect any lien or privilege for costs which the plaintiff heretofore possessed under the law of that section of the Province in which such writ shall have issued.

14.—The preferential lien of the landlord for rent in Upper Canada, is restricted to the arrears of rent due during the period of one year last previous to the execution of a deed of assignment, or the issue of a writ of attachment under the said Act as the case may be, and from thence, so long as the assignee shall retain the premises leased.

15.—The right of appeal granted by sub-section two of section seven of the said Act is hereby extended, and shall apply to any order of a Judge made upon any of the matters or things upon which he is authorized to adjudicate or to make any order by the said Act, or by this Act. And the delay for applying for the allowance of an appeal is hereby extended to eight days; and the provisions of the seventh sub-section of the seventh section of the said Act are hereby extended to all judgments and orders of a Judge which are rendered in Lower Canada under the said Act, or under this Act.

16.—No attachment, or seizure or sale under execution, of any of the estate or effects of an insolvent shall be issued, made or proceeded with, after an Assignee has been appointed under a Deed of Assignment, or liquidation, as the case may be. But all rights and remedies which might otherwise require to be enforced by such attachment, seizure or sale, shall be enforced by the Judge upon summary petition duly signified to the assignee and to parties interested, and by the assignee under the order of the Judge to be made thereon.

17.—If at the time of the issue of a writ of attachment or the execution of a deed of assignment, any immovable property or real estate of the insolvent be under seizure, or in process of sale, under any writ of execution or other order of any competent court, such sale shall be proceeded with by the officer charged with the same—unless stayed by order of the Judge upon application by the guardian or assignee and upon special cause shewn, and after notice to the Plaintiff, reserving to the party prosecuting the sale, his privileged claim on the proceeds of any subsequent sale, for such costs as he would have been entitled to be paid by privilege, out of the proceeds of the sale of such property, if made by such officer. But if such sale be proceeded with, the moneys levied therefrom shall be paid over to the assignee for distribution according to the rank and priority of the claimants thereon, and the officer charged with the execution shall make his return accordingly.

18.—Upon a secured claim being filed, with a valuation of the security, it shall be the duty of the assignee to procure the authority of the creditors at their first meeting thereafter, to consent to the retention of the security by the creditor, or to require from him an assignment, and delivery thereof. And if any meeting of creditors take place without deciding upon the course to be adopted in respect of such secur-

ity, the assignee shall act in the premises according to his discretion, and without delay.

19.—If the security consist of a mortgage upon real estate, or upon ships or shipping, the property mortgaged shall only be assigned and delivered to the creditor, subject to all previous mortgages, *hypothèques*, and liens thereon, holding rank and priority before his claims; and upon his assuming and binding himself to pay all such previous mortgages, *hypothèques*, and liens,—and upon his securing previous charges upon the property mortgaged in the same manner, and to the same extent as the same previously secured thereon; and thereafter the holders of such previous mortgages, *hypothèques*, and liens shall have no further recourse or claim upon the estate of the insolvent.

20.—In any contestation in insolvency being proceeded with before an assignee, the assignee may issue subpœnas requiring the attendance of witnesses, and the production of documents by such witnesses—in the same manner as such subpœnas may be issued by the ordinary courts of law—and any witness so summoned may be punished for disobedience to any such subpœna, by the Judge, upon summary petition, in the same manner as any witness may be punished for disobedience to a subpœna issued from the court in which the Judge has jurisdiction.

21.—If for any purpose it becomes necessary to ascertain the proportion of the creditors of an insolvent who have voted at any meeting or concurred in any act or document; and if it be found that the whole of the creditors holding claims against an insolvent for sums of one hundred dollars and upwards do not represent the proportion in value of the liabilities of the insolvent subject to be computed in that behalf and required to give validity to such vote, act or document, such proportion may be completed by the votes or concurrence of creditors holding claims of less than one hundred dollars each.

22.—In the nomination of an assignee, in the granting of an allowance to the insolvent, in the execution of a deed of composition and discharge, in the consent to a discharge, and in every other matter wherein the right of a creditor to vote or act depends upon the amount of his claim, every creditor whose claim amounts to or exceeds one hundred dollars shall have such right; subject always to the provisions of the said Act respecting the voting and action of secured creditors; and the proportions of creditors so voting or concurring shall be ascertained by computing all claims entitled so to vote or act.

23.—Nothing in the said Act contained shall invalidate payment made by a debtor of the insolvent to the insolvent within one week after the execution of a deed of assignment or of the issue of a writ of attachment, in good faith, and in ignorance of the insolvency of his creditor.

24.—The statute of set-off shall apply to all claims in insolvency and also to all suits instituted by an assignee for the recovery of debts due to the insolvent in the same manner and to the same extent as if the insolvent were himself plaintiff or defendant as the case may be, except in so far as any claim for set-off shall be affected by section eight of the Insolvent Act of 1864, treating of fraud and fraudulent preference.

25.—Any affidavit requiring to be sworn in proceedings in insolvency may be sworn before any Commissioner for taking affidavits appointed by any of the Courts of Law or Equity in this Province.

26.—The forms A, H, K, N, O and Q to this Act appended are substituted for and shall be used respectively instead of the forms A, H, K, N, O and Q appended to the said Act, and the publication thereof in the *Canada Gazette* may be restricted to one language in the discretion of the person causing such advertisement to be published; and in publishing any notice required by the said Act, the form whereof is not given therein, such will be sufficient as shall intelligibly express the purport of such notice.

27.—The provisions of the said Act shall apply to the heirs, administrators or other legal representatives of any deceased person who, if living, would be subject to its provisions; but only in their capacity as such heirs, administrators or representatives, without their being held to be liable for the debts of the deceased to any greater extent, than they would have been, if the said Act and this Act had not been passed.

28.—If any creditor of an insolvent, directly or indirectly takes or receives from such insolvent any payment, gift, gratuity or preference or any promise of payment, gift, gratuity or preference, as a consideration or inducement to consent to the discharge of such insolvent, or to execute a deed of composition and discharge with him; such creditor shall forfeit and pay a sum equal to treble the value of the payment, gift, gratuity or preference so taken, received or promised; and the same shall be recoverable by the assignee for the benefit of the estate, by suit in any competent court, and when recovered shall be distributed as part of the ordinary assets of the estate.

29.—If, after the issue of a writ of attachment in insolvency, or the execution of a deed of assignment, as the case may be, the insolvent retains or receives any portion of his estate or effects, or of his moneys, securities for money, business papers, documents, books of account, or evidences of the debt, or any sum or sums of money, belonging or due to him, and retains and withholds from his assignee, without lawful right, such portion of his estate or effects of his moneys, securities for money, business papers, documents, books of account, evidences of debt, sum or sums of money, the assignee may make application to the Judge by summary petition, and after due

notice to insolvent, for an order for the delivery over to him of the effects, documents or moneys, so retained; and in default of such delivery in conformity with any order to be made by the Judge, upon such application, such insolvent may be imprisoned in the common gaol, for such time, not exceeding one year, as such Judge may order.

30.—Whenever, under the said Act, a meeting of creditors cannot be held, or an application made until the expiration of a delay named therein, the notices of such meeting or application may be given pending such delay.

FORM A.

*Insolvent Act of* 1864

The Creditors of the undersigned are notified to meet at——, in——on——, the——day of——at——o'clock,——, to receive statements of his affairs, and to name an Assignee. (*Domicile of debtor and date.*)

(*Signature*).

*The following to be added to notices sent by Post:*

The Creditors holding direct claims and indirect claims, maturing before the meeting, for one hundred dollars each and upwards, are as follows: (*names of Creditors and amounts due*) and the aggregate of claims under one hundred dollars, is——. (*Domicile of Debtor and date.*) (*Signature*).

FORM H.

*Insolvent Act of* 1864.

A. B., Plaintiff.

C. D., Defendant.

A Writ of Attachment has issued in this cause.

(*Place. Date.*) (*Signature*).

Sheriff.

FORM K.

*Insolvent Act of* 1864.

In matter of A. B. (*or* A. B. & Co.), an insolvent.

The undersigned has been appointed Assignee, in this matter, and requires claims to be filed within two months from this date.

(*Place. Date.*) (*Signature*).

Assignee.

FORM N.

*Insolvent Act of* 1864.

In matter of A. B. (*or* A. B. & Co.), an insolvent.

A dividend sheet has been prepared, subject to objection until the——day of——, (*Date*). Assignee.

FORM O.

*Insolvent Act of* 1864.

Province of Canada, District (*or* County) of ——

In the (*name of Court.*)

In the matter of A. B. (*or* A. B. & Co.), an insolvent.

The undersigned has filed a consent by his creditors to his discharge (*or* a deed of composition and discharge, executed by his Creditors), and on——the——day of——next, he will apply to the said court *or* to the Judge of the said Court, (*as the case may be*) for a confirmation thereof.

(*Place. Date.*)

(Signature of Insolvent, or of his Attorney *ad litem.*)

FORM Q.

*Insolvent Act of* 1864.

Province of Canada, District (*or* County) of ——

In the (*name of Court*).

In the matter of A. B. (*or* A. B. & Co.), an insolvent.

On——the——day of——next, the undersigned will apply to the said Court *or* the Judge of the said Court, (*as the case may be*) for a discharge under the said Act.

(*Place. Date.*)

(Signature of the Insolvent, or his Attorney *ad litem.*)

## An Act to amend the Act respecting Attorneys.

[Assented to 18th September, 1865.]

Whereas by the Act passed in the twenty-eighth year of Her Majesty's Reign, chaptered twenty-one, and intituled "An Act to amend the Act respecting Attorneys," the fourth sub-section of the third section of chapter thirty-five of the Consolidated Statutes for Upper Canada, was repealed, and a new fourth sub-section was substituted in lieu thereof; and whereas the fifth sub-section of the third section of the said chapter thirty-five conflicts with the said substituted sub-section, and it is desirable that the same should be repealed; Therefore, Her Majesty, by and with the advice and consent of the Legislative Council and Assembly of Canada, enacts as follows:

1.—The fifth sub-section of the third section of chapter thirty-five of the Consolidated Statutes for Upper Canada shall be and the same is hereby repealed.

## An Act to amend the Act intituled "An Act respecting County Courts."

[Assented to 18th September, 1865.]

Her Majesty, by and with the advice and consent of the Legislative Council and Assembly of Canada, enacts as follows:

1.—The fifth section of the fifteenth chapter of the Consolidated Statutes for Upper Canada is hereby amended and extended by the addition of the words, "or as a convey-"ancer, or do any manner of conveyancing, or

"prepare any papers or documents to be used "in any Court of this Province," which words are hereby incorporated in that section, and shall be read as a part thereof immediately after the word "Public," in such section.

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An Act to declare valid certain Sales of Lands in Upper Canada.

[Assented to 18th September, 1865.]

Whereas, by an Act passed in the Session of Parliament held in the thirteenth and fourteenth years of Her Majesty's Reign, chapter sixty-seven, intituled: "*An Act to establish a more equal and just system of Assessment in the several Townships, Villages, Towns, and Cities in Upper Canada,*" it was amongst other things enacted that certain lands upon which any taxes should remain unpaid on the 1st day of January, one thousand eight hundred and fifty-one, or so much thereof as should be sufficient to discharge such taxes, with interest and costs, should be sold by the Sheriff or High Bailiff in manner in and by the said Act particularly mentioned and set forth. And whereas, it was further provided by the said Act, that the owner of any such lands so sold as aforesaid, might redeem the same within three years from day of sale, and in case the same should not be so redeemed within that period, then that the Sheriff or High Bailiff, at any time after the expiration of that period, should axecute and deliver a deed of sale of such land to the purchaser, his heirs and assigns.

And whereas, under the provisions of the said Act, various lands, upon which taxes were unpaid as aforesaid, were in the year one thousand eight hundred and fifty-two, sold by various Sheriffs of Counties in Upper Canada; which lands were never redeemed by the owners, according to the provisions of the said Act.

And whereas, after such sales were made, and before the said period for the redemption thereof had expired, that is to say, on the fourteenth day of June, one thousand eight hundred and fifty-three, a certain other Act was passed (sixteenth Victoria, chapter one hundred and eighty-two), which took effect on the first day of January, one thousand eight hundred and fifty-four, whereby the said first-mentioned Act (thirteenth and fourteenth Victoria, chapter sixty-seven), was repealed, and no provision was made thereby for completing the sales made under the authority of the said first-mentioned Act.

And whereas, in many cases, the lands sold under the said first-mentioned Act have never been redeemed, and the purchasers thereof have obtained deeds thereof from the respective Sheriffs, and gone into possession thereof, and made valuable improvements thereon.

And whereas, it has been decided and adjudged that by reason of the repeal of the first-mentioned Act, before the expiration of the period allowed for the redemption of such lands, and before the execution by the Sheriff to the purchaser, of a deed of the same, the title of such purchaser is defective, and unless a remedy be provided much loss and injury will be sustained by innocent purchasers; and it is expedient to provide a remedy in that behalf.

Therefore, Her Majesty, by and with advice and consent of the Legislative Council and Assembly of Canada, declares and enacts as follows:—

1.—In all cases where lands were legally sold for taxes under the authority of the said first-mentioned Act, and not redeemed within the period by that Act limited in that behalf, and the purchaser or those claiming under him shall have gone into actual possession, such sales shall be and are hereby declared legal and binding upon all parties concerned, and all deeds executed or that may be executed by the Sheriff for conveying such lands to the respective purchasers thereof, shall be held to be legal and valid, anything in the said statute secondly hereinbefore-mentioned or any other statute or law to the contrary notwithstanding.

2.—In all cases where the purchaser at such sales, or those claiming under him shall not have gone into actual possession of the lands sold, the owner of such last-mentioned land may redeem the same within one year from the passing of this Act by paying the amount of the taxes for which the lands were sold and the costs of the sale, and ten per cent. interest thereon, together with all taxes that may have been paid by the purchaser or his assigns, and ten per cent. interest thereon—and in default thereof such last-mentioned sales are hereby declared to be legal and binding upon all parties concerned, and all deeds executed or that may be executed by the Sheriff for conveying such last mentioned lands to the respective purchasers thereof shall be held to be legal and valid.

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An Act to regulate the Costs of Arbitrations in Upper Canada.

[Assented to 18th September, 1865.]

For restraint of unreasonable charges attending Arbitrations; Her Majesty, by and with the advice and consent of the Legislative Council and Assembly of Canada enacts as follows:

1.—No arbitrator who is not by profession and calling a barrister, attorney, engineer, architect, or deputy provincial land surveyor, shall be entitled to demand or take for his attendance and services as an arbitrator, any greater fees than are hereinafter set down in the schedule to this Act, marked A.

2.—No arbitrator who is by profession and calling a barrister, attorney, engineer, or deputy provincial land surveyor, shall be entitled to demand or take for his attendance and services as such arbitrator any greater fees than

are hereinafter set down in the schedule to this Act, marked B.

3.—No greater fees shall be taxed or allowed to any persons called as witnesses before any arbitrator or umpire than would be taxed and allowed to the same persons in an ordinary suit before a Court having jurisdiction over the subject-matter of reference.

4.—Whenever, at any meeting of arbitrators of which due notice has been given to the respective parties, no proceedings are taken in consequence of the absence of either of the parties or because a postponement is made by the arbitrators at the request of either party to some future day, the arbitrators shall make up an account of the costs, charges and disbursements of such meeting, including the proper charge for their own attendance and that of any witnesses, and of the counsel or attorney of the party present or not desiring such postponement, and shall charge the amount thereof, or of the disbursements against the party making default in attending, or at whose request the postponement shall have been made (unless the arbitrators under the special circumstances of the case shall think that it would be unjust to charge such disbursements, or costs, charges and disbursements against him), and such last-named party shall be bound to pay the same to the other, whatever may be the event of the award and reference, and the arbitrators shall, in the award make any direction or adjudication necessary for that purpose, and if such sum be payable by the party in whose favor the award is otherwise made, it may be set off against, and deducted from, any amount awarded in favor of that party.

5.—Either party to an arbitration shall be entitled to have the costs thereof taxed, including the fees to the arbitrators, by the master of either of the Superior Courts at Toronto having jurisdiction of the cause; or in cases where the arbitrators determine the amount of the costs, or where there is no cause in Court, by the master to be named in a Judge's order, which may be granted for that purpose on a proper application on affidavit, setting forth the facts.

6.—The master shall in no case tax higher fees than are set down in this Act, but upon reasonable grounds established before him upon affidavit, he may in taxation reduce the maximum mentioned in the schedules, but not below the minimum, having always regard to the length of the arbitration, and to the value of the matter in dispute and the difficulty of the questions to be decided, but he shall not tax more than one counsel fee to either party for any meeting of the arbitrators.

7.—The master may tax and allow a reasonable sum for the preparation and drawing up of the award.

8.—A revision of taxation may at any time be granted upon application to the Court or a Judge, reasonable ground being shewn.

9.—It shall be lawful for the parties who refer any matter in difference between them to arbitration, whether any cause, suit, or action be pending between them or not, to agree by writing signed by them, or by making such agreement a part of their submission, to pay to the arbitrator or arbitrators, if more than one—and for this purpose an umpire duly appointed shall be included in the term arbitrators—such fees or sums for each day's attendance, or such gross sums for their taking upon themselves the burden of the reference and making the award, as the said parties shall see fit, and in every such case the fees and sums so agreed upon shall be substituted for those set down and authorized in the schedules to this Act, and shall be taxed and allowed by the master accordingly.

10.—If any arbitrator, after taking upon himself the burden of any reference, and after hearing the parties, their counsel and attorneys or evidence, as the case may be, shall refuse or delay, after the expiration of one calendar month from the close of the proceedings before him, to make, execute and deliver his award upon the matters submitted until a larger sum is paid to him for his fees than is by this Act permitted, and may be taxed; or shall receive for such his award, or for his fees as arbitrator, any such larger sum, he shall, for each and every such refusal or delay, forfeit and pay to the party who has demanded and was entitled to obtain the award, or who has paid to the arbitrator any such larger sum in order to obtain, or as a consideration for having obtained such award, treble the amount of the whole sum demanded by the arbitrator, and to obtain payment whereof he has refused or delayed as aforesaid to make, execute or deliver his award, and received by him contrary to the provisions of this Act, such treble sum or sums to be recoverable with full costs in an action of debt to be brought in either of the Superior Courts of Common Law.

11.—In all cases where an award has heretofore been or shall hereafter be made, the arbitrator making the same may maintain an action for his fees upon such award, after the same shall have been taxed, which taxation may be made at the instance of the arbitrator upon notice to any party to the reference; against whom he may afterwards bring such action, and in the absence of an express agreement in respect thereof, the arbitrator may maintain such action, after such taxation, against all the parties to such reference jointly or severally.

12.—The word "arbitrator" in the Act shall be taken to include all arbitrators, every umpire or umpires, and every referee in the nature of an arbitrator; and the word "award" shall include every umpirage and every certificate in the nature of an award.

13.—This Act shall extend only to Upper Canada.

SCHEDULE A.

| | |
|---|---|
| For every meeting where the cause is not proceeded with, but an enlargement or postponement is made at the request of either party not less than | $2 00 |
| nor more than | 4 00 |
| For every day's sitting, to consist of not less than six hours, not less than | 5 00 |
| nor more than | 10 00 |
| For every sitting not extending to six hours (fractional parts of hours being excluded) when arbitration is actually proceeded with, for each hour occupied in such proceedings, at the rate of not less than | 1 00 |
| nor more than | 1 50 |

SCHEDULE B.

| | |
|---|---|
| For every meeting where the cause is not proceeded with, but an enlargement or postponement is made at the request of either party, not less than | $4 00 |
| nor more than | 8 00 |
| For every day's sitting, to consist of not less than six hours, not less than | 10 00 |
| nor more than | 20 00 |
| For every sitting not extending to six hours (fractional parts of hours being excluded) where the arbitration is actually proceeded with, for each hour occupied in such proceedings, at the rate of not less than | 2 00 |
| nor more than | 3 00 |

An Act to extend the Act to impose duties on Promissory Notes and Bills of Exchange to all Notes & Bills of whatever amount, and otherwise to amend the said Act.

[Assented to 18th September, 1865.]

Whereas it is expedient to impose duties on promissory notes and bills of exchange now excepted from the operation of the Act passed in the session held in the twenty-seventh and twenty-eight years of Her Majesty's Reign, chapter four, and otherwise to amend the said Act: Therefore, Her Majesty, by and with the advice and consent of the Legislative Council and Assembly of Canada, enacts as follows:

1.—Upon and in respect of every promissory note, draft or bill of exchange, for an amount less than one hundred dollars, made, drawn or accepted in this Province upon or after the first day of January, in the year one thousand eight hundred and sixty-six, there shall be levied, collected and paid to Her Majesty, for the public uses of the Province, the duties hereinafter mentioned, that is to say:—

On each such promissory note, and on each such draft or bill of exchange, a duty of one cent, if the amount of such note, bill or draft, does not exceed twenty-five dollars;—a duty of two cents if the amount thereof exceeds twenty-five dollars but does not exceed fifty dollars,—and a duty of three cents if the amount thereof exceeds fifty dollars but is less than one hundred dollars.

2.—The Governor in council may from time to time direct stamped paper to be prepared for the purposes of the Act cited in the preamble and of this Act, of such kinds and bearing respectively such device as he thinks proper, and may defray the cost thereof out of any unappropriated monies forming part of the Consolidated Revenue Fund; but the device on each stamp shall express the value thereof, that is to say, the sum at which it shall be reckoned in payment of the duties imposed by the said Act, and by this Act; and any such stamp on the paper on which any note, bill or draft is written shall have in all respects the same effect as an adhesive stamp of the same value; and all the provisions of the thirteenth section of the Act cited in the preamble shall apply to the stamps on paper stamped under this section as fully as to the adhesive stamps mentioned in the said Act, as shall also all other provisions of the said Act which can be so applied, and are not inconsistent with this Act.

3.—Upon, from, and after the first day of October next after the passing of this Act, it shall not be necessary that the signature or part of the signature of the maker or drawer, or in the case of a draft or bill made or drawn out of this Province, of the acceptor or first endorser in this Province, or his initials, or some integral or material part of the instrument, be written on any adhesive stamp affixed to any promissory note, draft, or bill of exchange, but the person affixing such adhesive stamp, shall, at the time of affixing the same, write or stamp thereon the date at which it is affixed, and such stamp shall be held *primâ facie* to have been affixed at the date stamped or written thereon, and if no date be so stamped or written thereon such adhesive stamp shall be of no avail; any person wilfully writing or stamping a false date on any adhesive stamp shall incur a penalty of one hundred dollars for each such offence.

4.—No party to or holder of any promissory note, draft, or bill of exchange, shall incur any penalty by reason of the duty thereon not having been paid at the proper time and by the proper party or parties, provided that at the time it came into his hands it had affixed to it stamps to the amount of the duty apparently payable upon it, that he had no knowledge that they were not affixed at the proper time and by the proper party or parties, and that he pays such duty as soon as he acquires such knowledge,—and any holder of such instrument may pay the duty thereon, and give it validity, under section nine of the Act cited in the preamble, without becoming a party thereto;—In this section the word "duty" includes any double duty payable under the said section nine.

5.—This Act shall be construed as one Act with the Act cited in the preamble, and hereby amended, all the provisions whereof not inconsistent with this Act, shall apply to the duties and penalties hereby imposed as if such duties and penalties were imposed by the said Act.

## UPPER CANADA REPORTS.

### QUEEN'S BENCH

(*Reported by* C. Robinson, Esq., Q.C., *Reporter to the Court.*)

#### Regina v. Smith.

*Practice court—Habeas corpus—C. S. U. C. ch.* 10, *sec.* 9.

A judge in Practice Court has no authority to grant a rule *nisi* for a *habeas corpus ad subjiciendum;* and where such rule had been issued there returnable in full court, it was discharged on this preliminary objection.

[Q. B., E. T., 1865.]

*J. B. Read* obtained a rule in the Practice Court, calling upon the Attorney-General to shew cause why a writ of *habeas corpus ad subjiciendum* should not issue to the keeper of the Common Gaol of the County of Kent, to bring up the body of Andrew Smith, for his discharge from custody. This rule was made returnable in this court.

*Robert A. Harrison*, shewed cause.

He took a preliminary objection, that the Practice Court had no authority to grant such a rule, citing *Sams and The Corporation of Toronto*, 9 U. C. Q. B. 181, and subject thereto the rule was argued upon the objections raised to two warrants upon which the prisoner was committed.

Draper, C. J.—The power of a single judge sitting in banc during Term in the Practice Court is conferred by sec. 9 of Consol. Stat. U. C. ch. 10, in these words—"Every such judge so sitting apart in banc shall hold the Practice Court, and shall have the same powers and authority as belong to either of such Superior Courts in any way relating to the business of adding or justifying bail, discharging insolvent debtors, administering oaths, hearing and determining matters on motion, and making rules and orders, in causes and business depending in either of the said courts, in the same manner and with the same force, validity and effect as might be done by the court in which such causes or business may respectively be depending."

I think the words of the act do not include such a proceeding as the issuing the rule to shew cause above stated. Till this rule was moved there was no cause or business depending in relation to the prisoner's conviction or commitment, and the foundation for the jurisdiction of the judge sitting in the Practice Court did not exist.

The prisoner was brought before my brother *Hagarty* on a writ of *habeas corpus*, in order to apply for his discharge on the same objections as have been now raised, and was after argument remanded.

I have been made aware of the grounds of that decision, and as at present advised concur in them, though I cannot say I have arrived at a final conclusion (*a*).

On the preliminary objection this rule must be discharged.

My brother *Hagarty*, not having been able to consider the case with us, takes no part in this judgment.

Morrison, J., concurred.

Rule discharged.

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#### Gwynne v. The Grand Trunk Railway Co.

*Sheriff's fees—C. L. P. A. sec.* 271—*Construction of.*

A judge's order, under C. L. P. A. sec. 271, fixing the allowance to be made to the sheriff where there has been a seizure under execution but no money levied, is final.

In this case the sheriff rendered his bill, and the plaintiff obtained a summons to reduce it or determine what would be a reasonable charge. *Semble*, that the sheriff should have applied, in order to authorise him to make charges not sanctioned by the tariff.

*Semble*, also, the judge's duty is not to tax the sheriff's account, but to fix a rate of charges for services rendered, leaving it to the Master to determine the amount in case of dispute.

[Q. B., E. T., 1865.]

In Hiliary Term, *Stephens* obtained a rule calling on the plaintiff to shew cause why the order made by *Morrison, J.*, on the 3rd of February, 1865, should not be rescinded.

The order was made under the 271st section of the Consol. Stat. U. C. ch. 22, C. L. P. A. which, among other things, provides that if the real or personal estate of a defendant be seized or advertised on an execution, but not sold, from any cause, and no money be actually levied, the sheriff shall not receive poundage, and the court out of which the writ issued, or any judge thereof in vacation, may allow him a reasonable charge for any service rendered in respect thereof, in case no special fee be assigned in any table of costs.

The sheriff in this case received a *fi. fa.* against goods, upon which proceedings were stayed, and there was neither sale nor advertisement. He rendered a bill of his charges, without having obtained any rule of court or judge's order allowing any of those for which no special fee is assigned in the tariff.

Upon this the plaintiff obtained a summons, to reduce, or determine the amount which should be deemed a reasonable charge, on which above order was made.

*Gwynne*, Q.C., shewed cause.

Draper, C. J.—Regularly, as it seems to me, the sheriff should have applied, in order to obtain the authority to claim the fees or charges not sanctioned by the existing tariff. However, both parties appeared before my brother Morrison, who made the order above mentioned, fixing what, upon the affidavits before him, he deemed "a reasonable charge."

The sheriff moves to rescind the order, on the ground that it does not allow to him as many days possession money as he claims to be entitled to, and that the sum allowed for each day's keeping is too small.

I rather incline to the opinion that the more regular course would have been to have fixed by the judge's order the daily sum which should be allowed for possession money, and if the number

(*a*) The judgment in Chambers is reported in 1 U. C. L. J. 241, N. S. [Rep. note.]

of days was in dispute to have referred that point to the Master, who would then have a complete tariff to enable him to tax the sheriff's whole bill. No objection is however urged except those above stated.

In my opinion the order of the judge in vacation as to what is to be deemed "a reasonable charge" for services not provided in any tariff, is as final as a rule of court on the same subject would be in term; and I arrive at this conclusion, among other reasons, because I think it was not meant that either the court or a judge should tax the sheriff's account, and determine what services the sheriff had rendered, but that they should supply the foundation for ascertaining what he is entitled to, by fixing a rate of charge for services rendered and for which no rule of court or tariff has made any provision.

I think therefore the rule should be discharged, but without costs, as the point has not been previously raised.

My brother *Hagarty*, having considered this case with us, concurs in the judgment.

Morrison, J., concurred.

Rule discharged.

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### The Queen v. Wheeler et al.

*Con. Stat. U.C. cap.* 117—*Recognizance improperly estreated—Relief of bail.*

Where bail entered into a recognizance conditioned for the appearance of their principal to answer a charge of assault with intent to commit rape, and the only bill found against the accused was for the more serious offence of rape, and their recognizance estreated for his non-appearance to answer that charge, a rule was made absolute for their relief from the estreated recognizance.

[Q. B., E. T., 1865.]

*John McBride*, during Easter term last, obtained a rule calling upon the Attorney-General or his agent to show cause why the writ of *fieri facias* issued to the sheriff of the county of Kent, against Josiah Hewson and John Myers, in this matter, should not be set aside, or all proceedings thereon perpetually stayed, on (among others) the following ground: that William Wheeler was committed on a charge of rape and attempting to procure an abortion, and the condition of the said recognizance was that he should take his trial on a charge of assault with intent to commit rape, and the bill found by the grand jury against the said Wheeler was for rape and that only; or why the said recognizance and the said writ of *fieri facias* should not be discharged and set aside on all or any of the grounds mentioned in the rule, and on the other grounds set forth in affidavits and papers filed; or why such order should not be made regarding the discharge of the said forfeited recognizance as this court should deem fit on the return of the said rule.

The recognizance was in the following form:

County of Kent, to wit. } Be it remembered, that on the tenth day of March, in the year of our Lord 1865, Josiah Hewson, of the gore of Camden, and John Meyers, of same place, personally came before me, the undersigned, one of Her Majesty's justices of the peace in and for the said county, and severally acknowledged themselves to owe to our Sovereign Lady the Queen the several sums following, that is to say: the said Josiah Hewson in the sum of two hundred dollars, and the said John Meyers in the sum of two hundred dollars, of good and lawful money of Canada; to be made and levied of their several goods and chattels, lands and tenements, respectively, to the use of our said Lady the Queen, her heirs and successors, if William Wheeler fail in the condition following.

Taken and acknowledged the day and year first above mentioned, at Chatham, before me.

(Signed) Thos. McCrea, [L.S]
Police Magistrate.

The condition of the above recognizance is such, that whereas the said William Wheeler was charged, before James Smith, Esq., and other justices then present, for that he the said William Wheeler, within six months past, did assault Emily Wilson with intent to commit rape upon the said Emily Wilson; if, therefore, the said William Wheeler will appear at the next Court of Assize and Nisi Prius and General Gaol Delivery, to be holden in and for the county of Kent, and plead to such indictment as may be found against him by the Grand Jury, for and in respect of the charge aforesaid, and take his trial upon the same, and not depart the court without leave, then the said recognizance to be void, or else to remain in full force and virtue.

The bill found by the grand jury was for rape, and it was for non-appearance to the bill so found that the recognizance was estreated.

The only point argued was that as to the difference between the recognizance and the bill found, and the effect thereof on the obligation of the bail.

*Robert A. Harrison*, during last Trinity term, showed cause.

*John McBride* supported the rule.

Hagarty, J.—We think this estreat cannot be sustained. The condition of the recognizance was for the appearance of the accused to such indictment as should be found against him for an assault on Emily Wilson with intent to commit rape; but the bill found was for the more serious offence of rape. Bail might well be content to become bail for the appearance of the accused to answer the lesser charge, and yet refuse to become so on a charge more grave. They did not become bail for the appearance of the accused to answer a charge of rape, and his non-appearance to answer that charge was no breach of the recognizance. The rule must be made absolute for the relief of the bail.

Morrison, J., concurred.

*Per cur.*—Rule absolute.

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### The Queen v. Ritchie.

*Con. Stat. U. C. cap.* 117—*Bail—Condition of recognizance—Meaning thereof—Relief from estreat.*

*Held*, that under an ordinary recognizance of bail on an indictable charge, the accused is not bound to appear unless a bill be found against him; when therefore the accused was called, though the grand jury had not, owing to absence of witnesses, an opportunity of finding a bill, and his recognizance estreated, a rule was made absolute for the relief of the bail.

[Q. B., E. T., 1865.]

*D. McMichael*, during last Easter term, obtained a rule calling on the Attorney-General or his

agent to show cause why the estreat of the recognizance of Henry Smyth and Alfred Smyth for the due appearance of above defendant, dated 27th October, 1864, should not be set aside, and why the *fieri facias* issued thereon on the 5th April, 1865, and returnable into this court, should not be set aside on the ground that no forfeiture of the said recognizance had taken place, no indictment having been found against the said Joshua Ritchie, at the Court of Oyer and Terminer and General Gaol Delivery, in the county of Kent, at which the said Joshua Ritchie was to appear, and that no breach of the condition of the recognizance had been made, and on grounds disclosed in affidavits filed.

It appeared that on or about the 25th October last, Joshua Ritchie was committed to the common gaol of the county of Kent, to await his trial at the then next Court of Oyer and Terminer for the county of Kent, charged with a breach of the Foreign Enlistment Act; that on the 27th October last he was admitted to bail, to await his trial at the said court; and that the recognizance was in the ordinary form.

The condition of the recognizance, which was also in the ordinary form, was as follows: "The condition of the within written recognizance is such, that whereas the said Joshua Ritchie was this day charged before, &c., for that, &c.; if, therefore, the said Joshua Ritchie will appear at next Court of Oyer and Terminer, &c., to be holden, &c., and there surrender himself into the custody of the keeper of the common gaol there, and plead to such indictment as may be found against him by the grand jury for and in respect of the charge aforesaid, and take his trial upon the same, and not depart the said court without leave, then the recognizance to be void, &c."

The witness for the prosecution not appearing, the grand jury had no opportunity of finding a bill; but the accused, notwithstanding, was called, and not appearing, his recognizance estreated.

*Robert A. Harrison* showed cause, and argued that the condition of the recognizance was not simply to appear if a bill were found, but absolutely to appear at the court, and there surrender himself, and (in the event of a bill being found) plead to such indictment, &c.

*D. McMichael*, in support of the rule, contended that such was not the legal effect of the condition, and that in practice the accused was never required to appear unless a bill were found.

Hagarty, J.—I am aware the construction for which Mr. Harrison contends has prevailed in some counties, and I think, looking at the object of the recognizance and the reason of the law, that his criticism of the words of the recognizance is too sharp. I do not think it was intended by the Legislature that the accused should appear and surrender himself unless a bill were found. The estreat of the recognizance here was therefore premature. The rule must be made absolute for the relief of bail.

Morrison, J., concurred.

*Per cur.*—Rule absolute.

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## COMMON LAW CHAMBERS.

(*Reported by* Robt. A. Harrison, Esq., *Barrister-at-law.*)

### Dunn v. Jarvis.

*Con. Stat. U. C. cap. 22, sec. 57—Final judgment in default of a plea—When regular.*

Where plaintiff's declaration contained two counts—the first in case against a sheriff for alleged breach of duty in not paying over money levied under an execution, and the second for money had and received—it was *held*, that plaintiff could not in default of a plea sign final judgment under sec. 57 of C. L. P. Act.

[Chambers, April 10, 1865.]

*T. H. Ince* obtained a summons calling on the plaintiff to show cause why the final judgment entered in this cause should not be set aside, upon the ground that the action was one for damages, which could only be assessed by a jury, and upon grounds disclosed in affidavits and papers filed.

*John O'Connor* shewed cause.

The declaration contained two counts, the first in case against a sheriff for alleged breach of duty in not paying over money levied under an execution, and the second a count for money had and received. There being no plea filed or served, plaintiff entered final judgment, under sec. 57 of the C. L. P. Act.

Richards, C. J.—I think the declaring against the sheriff in case for a breach of duty, is not a proceeding in which final judgment can be entered under secs. 55 or 57 of Con. Stat. cap. 22. The action sounds in damages, which must be assessed by a jury. This is the best conclusion I can form in the haste in which I have been called upon to decide, and I must therefore set aside the judgment with costs. The joinder of the count for money had and received will not make the whole judgment regular, as the case of *Westlake* v. *Abbott*, 4 U. C. L. J. 46, decides.

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### Hooper v. Burley.

*Ejectment—Judgment as on a vacant possession—Regularity of—Idle and useless affidavits and statements in affidavits to be disallowed on taxation.*

*Held*, upon the facts disclosed in the affidavits filed in this cause, that the premises for which the action of ejectment was brought were vacant when the action was commenced and that judgment as on a vacant possession was duly obtained and entered.

Where plaintiff filed many useless affidavits and had a great many repetitions as well as idle statements on information and belief in affidavits filed, a direction was given to the master that they should not be allowed to the plaintiff on taxation, though he discharged defendant's summons with costs.

[Chambers, April 24, 1865.]

Ejectment, for that part of No. 36, 6th Concession, Ernestown, containing sixty-six acres, being that part of the north east half which lies north of the travelled road leading, &c.

Notice of plaintiff's title, under a deed of assignment from Nicholas Hinch to the plaintiff, of a mortgage made to George Hinch, deceased, dated 23rd February, 1858.

Writ served by affixing a true copy thereof and of the notice of title to the front door of the dwelling house on the premises, on the 18th February, 1865.

Affidavit of Alexander Dulmage, that defendant does not reside in Upper Canada, but is supposed to reside either in British Columbia or

California, but where is not ascertained, that the premises in question are now, *i.e.*, on 28th Feb., 1865, vacant and were so from the 18th of that month; that various ineffectual attempts were made to serve defendants's wife who usually resides in Ernestown.

Affidavit of plaintiff's attorney, that on 7th March he searched for an appearance, but none was filed.

On this a judge's order, dated 18th March, 1865, was made, under which plaintiff on 14th of March, entered judgment for want of an appearance.

On 24th March, Eliza Burley made affidavit, that she is wife of defendant; that defendant has been absent ten years from the Province, and is as she believes residing in British Columbia; that she has been in possession of the premises since defendant's departure from the Province; that her husband is the owner and has never to her knowledge disposed of the premises; that about a year ago, Patrick Hatch and John Waddell, took forcible possession of the premises in her absence, and put plaintiff in possession; that Hatch and Waddell were indicted and convicted for forcible entry and detainer (not saying of what premises); that on 3rd March, 1865, she took possession of the premises and moved her furniture into the dwelling house, and going to Kingston left her sister and daughter in possession, and during her absence plaintiff took possession; that she did not endeavour to avoid service of the writ, and verily believes service might have been made on her.

Her attorney made oath verifying copies of the affidavits filed on the application for leave to enter judgment. One was an affidavit of the plaintiff, stating among other things his title, according to the notice of title, and that George Hinch, the mortgagee of defendant, died unmarried and intestate, leaving him surviving, his mother, his brothers Edward and Nicholas and three sisters; that all his next of kin and heirs at law assigned their interest in the mortgage to Nicholas, who assigned to plaintiff, and that the mortgage is registered; that the mortgage with interest exceeds $1,000, and is long due and unpaid. In a second affidavit the attorney verifies a copy of the indictment against Hatch and Waddell, which charged the offence as committed against the defendant, Agnes Burley.

On these affidavits a summons was granted to set aside the judgment, alleging the possession was not vacant, and therefore the judge's order of the 18th March was wrongfully obtained.

In reply, the execution by defendant of the mortgage to plaintiff, was proved by the affidavits of a subscribing witness. Nicholas Hinch also made affidavit, that he saw defendant execute that mortgage in California which was sent to to Canada and registered, and that the memorial is a true copy of the mortgage. That after the mortgagee's death, his mother and other brothers and the sisters of the mortgagee assigned to Nicholas, who placed the mortgage and a note therein mentioned in his attorney's hands, with instructions to eject one Storms and Eliza Burley, defendant's wife; and an ejectment was brought in 1863, but the mortgage and note were mislaid and have not been found and that ejectment has not been proceeded with.

The plaintiff on the 11th April, 1865, made an affidavit, stating among other things, that the person last residing on the premises before issuing of the ejectment summons (which was tested 14th February last) abandoned the possession, and the keys were about 1st February last sent to the father of defendant's wife for her, and her attorney was immediately thereafter notified (not saying by whom or on whose behalf) that the keys were sent to her, but said attorney on her behalf refused to accept possession of the premises.

In another affidavit he swore the judgment was entered on the 14th March last, and a *hab. fac pos.* issued on that day, at which date he supposed the premises were vacant, and had no knowledge that the defendant's wife was in possession.

In a third affidavit he swore that the premises were vacant when he bought the mortgage, and sent two of his men, Hatch and Waddell, to take possession, who found the back door open and took possession and were convicted on an indictment for forcible entry and detainer in so doing. That when Nicholas Hinch brought his ejectment the tenant under defendant's wife vacated the premises, and they remained vacant until Hatch and Waddell entered.

Alexander Dulmage in a second affidavit, swore that he was present on the 28th December, 1864, when Abraham Snider (presumably the tenant under defendant's wife) left these premises, and that Snider was the last person who resided thereon, before the bringing of this action; that he resided there about eight months, and after he left the possession was vacant until defendant's wife entered, about the third of March last.

Defendant's wife made a further affidavit, swearing that until the sheriff's officer under the writ of *venditioni exponas*, (probably an error in the affidavit for *habere facias possessionem*) dispossessed her, she was not aware an action of ejectment had been commenced, and that till such dispossession she had no knowledge of any paper, summons or copy thereof, or of any paper whatever being stuck on the door of said dwelling house. She also swore that on the second of March she was informed "that one tenant of the plaintiff's, formerly in possession of the premises for which this action was brought, had left, and that the dwelling house was vacant," and that she took possession the next day, and that she "was only in possession of the said dwelling house twelve days, when she was put out of possession by a sheriff's officer."

Draper, C.J.—I conclude from these affidavits, 1. That Cyrus Burley was owner in fee of these premises. 2. That he mortgaged them in fee. 3. That the plaintiff became and now is assignee of that mortgage. 4. That the mortgage is over due and that the plaintiff (no other adverse right or title being shown) has a right in law to the possession. 5. That the defendant Cyrus Burley left this Province ten years ago, and has not since returned; and that he left his wife Eliza behind him. 6. That she has no special authority from him in relation to these premises, nor any other right or authority, unless such as she may derive from being defendant's wife. 7. That she did occupy the premises (how long not

appearing) after her husband went away. 8. That after she left, a tenant was in possession, probably her tenant, but not distinctly shown. 9. That such tenant abandoned the premises on hearing of Nicholas Hinch's ejectment. 10 That the premises were then vacant and continued so until and for some short time after this ejectment was brought. 11. That judgment as on a vacant possession was duly obtained and entered. 12. That the defendant cannot deny plaintiff's right to possession unless the mortgage is satisfied or void or some new arrangement has been made, which is not set up in the affidavits. Therefore plaintiff is lawfully entitled to the possession, and the summons must be discharged with costs.

There are many useless affidavits and a great many repetitions as well as idle statements on information and belief in affidavits filed for plaintiff. They should not be allowed to plaintiff on taxation.

Summons discharged with costs.

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Hope v. Muir et al.; (Bank of British North America, *Garnishees.*)

*Married Woman's Act—Con. Stat. U. C. cap. 73—Marriage, 28th May, 1859—Attachment of interest arising from her legacy to answer her husband's debts.*

Where, on a debt contracted in the year 1855, plaintiff, on the 26th November, 1864, recovered judgment against M. and others, he was held entitled to attach the interest of moneys arising out of the amount of a legacy deposited by the wife of M. in her own name in the Bank of the garnishees, she having been married on the 28th May, 1859. [Chambers, June 3, 1865.]

On a debt contracted in the year 1855, the plaintiff recovered a judgment in this court against the defendant Muir and others, on the 26th November, 1864, for $1,492 47, which is still due and unpaid.

On the 28th May, 1859, the defendant Muir married Eliza his present wife, who, by the will of her late uncle, Robert W. Harris, took to her own use a legacy to a large amount. Part of the interest arising therefrom, namely, $462 22, she lately deposited, to her own credit, in her own name, in the Bank of British North America, at its agency in Hamilton.

This money, by an order dated the 16th May, 1865, was ordered to be attached, and the garnishees were called upon to show cause why they should not pay it over to the judgment creditor.

After the service of this order, Muir and his wife sued the garnishees; and while the garnishee proceedings were pending, were proceeding to enforce the payment of the money.

Whereupon the defendants in that action and the garnishees in this matter applied for leave to pay the money into court, which was granted, and they paid it into court.

Some preliminary objections were raised by the attorney of Mrs. Muir, which were not pressed, and the sole question raised was, whether this money was liable for the debt of Muir.

J. Wilson, J.—It is enacted by chapter 73 of the Consolidated Statutes of Upper Canada, section 2, among other things, that every married woman, who, on or before the 4th day of May, 1859, married without any marriage contract or settlement, shall and may, from and after that day, notwithstanding her coverture, have, hold and enjoy all her personal property not then reduced into the possession of her husband, whether belonging to her before marriage or in any way acquired by her after her marriage, free from his debts and obligations contracted after the 4th day of May, 1859, and from his control or disposition without her consent, in as full and ample a manner as if she were sole and unmarried.

It has not been shown what the provisions of the will of the late Mr. Harris were; but the attorney for Mrs. Muir stated on oath that the moneys were the sole and only property of Mrs. Muir, and were a portion of certain moneys settled on her and her issue by Mr. Harris, and are by the terms of the settlement entirely beyond the control of her husband or his creditors. He is here speaking of the principal moneys, for on the argument the money in question is spoken of as the interest which Mrs. Muir had received and deposited in her own name and to her own credit. It is now in court, having been paid in at her suit, her husband joining in the action.

I take it for granted that in making so great and so sudden a change in the law of property as this statute (Con. Stat. U. C. cap. 73) did, the Legislature intended to save the rights of those who had made contracts on the faith of the law as it stood before the passing of this act. The money in dispute would then have been Muir's. But under the circumstances disclosed on oath and admitted on the argument, the statute leaves the rights of the parties as if no change had been made in the law. This money ought therefore, I think, to be paid to the judgment creditor.

Order accordingly.

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## UNITED STATES REPORTS.

### SUPERIOR COURT.

Before Robertson, C. J., Garvin and McCunn, J.J.

Wilkins v. Earle et al.

*Liability of innkeepers for money lost from safe.*

(Continued from p. 249.)

Beyond that, unless the innkeeper has voluntarily and knowingly undertaken the custody or care of property, no case has adjudged his liability: some elementary writers and some dicta make him liable for everything a traveller chooses to bring into an inn. Judge Story, in his Commentaries, states the liability in general terms (p. 306, sec. 470); Chancellor Kent, in his, extends it to "all the moveable goods, chattels and moneys of the guest which are within the inn" (2nd vol. 593). In *Coyle's* case (*ubi sup.*) it is said to embrace even documents relating to the title of lands and choses in action. In *Kent* v. *Shuckard* (Q. & Ad. 803) the only question raised was, whether the innkeeper was liable for money as well as other chattels, and it was held that he was: the amount lost in that case was only fifty pounds, and it was stated to have been kept to meet daily expenses only. In *Quintin* v. *Courtney* (Hay [N. C.] 41) the amount was only two hundred dollars; and the case of *Fowler* v. *Dorlon*, in our own court (24 Barb. 384), is in direct con-

flict with the principle held in that case. In *The Berkshire Woollen Company* v. *Proctor* (7 Cush. 417), although the money lost was more than sufficient to defray the expenses of the particular guest in whose charge it was, it was the property of another person, and left with such guest to pay to others who were guests at the same inn, or to defray their expenses there, they being witnesses in a law suit, whose management was the errend of such guest at such inn, and all such circumstances are dwelt upon in the opinion delivered in that case. Nothing was said, except in general terms, in *Purvis* v. *Coleman* (21 N. Y. 111) about the liability of an innkeeper who had not given any notice to his guests of means provided for the safe keeping of their property. In that case he was held to be exempt from liability for a loss, in consequence of the failure of the guest to avail himself of such means after notice. In the case of *Giles* v. *Libby*, *ubi sup.*, it was held that ornaments or money usually carried about the person by a prudent man did not come within the provisions of the statute of 1855 (cap. 421), exempting innkeepers from liability for goods of a guest not deposited in a place of safe keeping provided by them, after notice of such provision, as the money lost (twenty-five dollars) was held not to be more than a prudent person might carry about with him.

Being thus at sea in regard to direct decisions as to the extent of an innkeeper's liability for the goods of his guest, we can only have recourse to indirect recognitions of the true doctrine in decided cases, to analogies to the liability of other persons and principles drawn from the origin and nature of the legal relation of the innkeeper and his guests.

It has always been conceded that, upon all the goods for whose safe keeping he is liable, an innkeeper has a lien for the keeping of his guest (*Grinnell* v. *Cook*, 3 Hill, 485; *Ingoldsbee* v. *Wood*, *ubi sup.*), even when they are not the property of his guest (*Robinson* v. *Walter*, Bulstr. R. 269; S. C. Poph. 127). But in the case of *Broadwood* v. *Granava* (10 Ex. 417; S. C. 1 Jurist, N.S. 19; 2 L. J. Ex. 1), it was held that an innkeeper was not bound to receive a piano with a guest, and therefore had no lien upon it. Counsel in that case said, in argument, that he was "only compellable to take in such articles as both in nature and quality are reasonable for a traveller," to which Parke, B., assented, and added, "He is bound to take in those things with which a person ordinarily travels; * * * to receive all goods which by his public profession he engages to receive;" but put the pertinent interrogatory, "Is he bound to take in articles of extraordinary bulk?" to which I would add, "or value?" the principle being precisely the same.

The origin of the liability of an innkeeper to his guest for the loss of the latter's property while in his inn, the principle or policy applicable to it, and indeed the whole relation, are so analogous to those applicable to a common carrier and a passenger transported by him, in relation to what is called his "baggage," that the extent and conditions of their liability have been held to be the same (*Orange County Bank* v. *Brown*, 9 Wend. R. 85; Jones on Bailment, 103; Edwards on Bailment, 414). The definite term baggage, it is true, has been applied only to the property of the passenger carried about with him for travelling purposes, for which the carrier is liable; and probably if the same term had been applied in legal phraseology to the goods of a guest at an inn, for whose safe keeping an innkeeper was liable, the question of liability would have been long since settled. The same obligation is imposed upon both, upon account of the public character of their occupation of receiving travellers, by the carrier as passengers and by the innkeeper as guests, which involves also the necessity of receiving their travelling equipments, although the carrier escapes liability if they are not delivered directly into his custody (*Tower* v. *Utica and Schenectady Railroad Company*, 7 Hill, 47; *Cohen* v. *Frost*, 2 Duer, 335). Generally, neither receives separate compensation for care in regard to such baggage (*Powell* v. *Meyers*, 20 Wend. 591), except when a carrier receives compensation for it as freight. The same danger, in both cases, of fraud or carelessness on the part of the innkeeper and carrier, or their servants, and the impossibility of the constant attention of the owner of the goods to their safe keeping, is the ground of liability. Although the carrier has been held to be exempt from liability for money destined to meet travelling expenses (*Orange County Bank* v. *Brown*, 9 Wend. 85), yet this rule does not prevail when travelling abroad (*Duffy* v. *Thompson*, 4 E. D. Smith), in which case even a gun carried in a trunk and the tools of a trade have been included (*Davis* v. *Cayuga and Susquehanna Railroad Company*, 10 How. 330); articles usually worn about the person, such as a watch and articles of jewellery, are included in such liability, if in a trunk (*McCormack* v. *Hudson Railroad Company*, 4 E. D. Smith, 81). And although it is laid down in general terms that everything destined for the personal use, convenience, and even instruction and amusement of a passenger, is included in the baggage for whose safe transportation a carrier is liable (*Hawkins* v. *Hoffman*, 6 Hill, 586), yet the extent of his liability is very much narrowed; it does not embrace merchandise (*Pardee* v. *Drew*, 15 Wend. 457), or samples of it (*Hawkins* v. *Hoffman*, *ubi sup.*), or boxes of jewellery for sale (*Richards* v. *Westcott*, 2 Bosw. 587), or silverware (*Bell* v. *Drew*, 4 E. D. Smith, 59), or presents for friends (Ib.), or regalia or jewels of a society (*Nevins* v. *Bay State Steamboat Company*, 4 Bosw. 225); and it is fully settled that the mere acceptance of a trunk or baggage containing what is not for personal use, does not bind the carrier without knowledge of such contents (*Richards* v. *Westcott*, *ubi sup.*). Of course different rules prevail in regard to a common carrier of mere freight (*Batson* v. *Donovan*, 4 B. & A. 21; *Mills* v. *Cattle*, 6 Bing. 743), where goods of all kinds and of any amount of value are received, and a distinct compensation is paid for carrying them. Deceit practised in regard to goods carried as baggage relieves the carrier from liability, which it would not if carried as freight (*Richards* v. *Westcott*, *ubi sup.*). The presumption in regard to articles brought by travellers to an inn, as well to the depôt of a carrier for transportation, when contained in trunks or packages, and of unknown value, must be that they consist merely of the ordinary accompaniments of a traveller when travelling, and not articles or securities for com-

mercial or other purposes: if they are more, both the innkeeper and the carrier are at least entitled to notice of their value and character beyond that extent.

Previous to the introduction of the law allowing parties to be witnesses for themselves, travellers, in case of a loss at an inn of their personal effects, were allowed to testify to the contents of their trunks (*Taylor* v. *Monnot*, *ubi sup.*), and this was placed on the ground of the necessity of the case, counterbalancing the consideration of any danger arising therefrom by the fact that the loser could only recover to the extent of the value of what usually is carried by travellers. But the evil arising from such admission of testimony, which would be slight when confined within such limit, would become gigantic if a traveller could testify to the loss of articles of indefinite value, as to which there would be no power of contradiction.

It is possible that the liability of an innkeeper may be divided into two elements, as well as that of a carrier (*Dorr* v. *N. J. Steam Navigation Company*, 4 Sandf. 136), and that he may under that which makes him liable as a bailee be so liable for goods received by him into his inn, when, either from their appearance or actual notice, he knows they are not the usual accompaniments of a traveller as such, and assents to their reception, but still such notice would be requisite.

It is very plain that it would be highly unjust, and not founded upon any principle upon which an innkeeper's liability rests, for a traveller to bring into an inn unobserved any amount of valuables without notice to the innkeeper, and hold him responsible for their safe keeping. There must be some restriction or qualification of such liability, if it exist; and that must be a warning to the innkeeper of the extra risk he is about to run. It is not very material, in such cases, whether such notice is made a condition of such liability, or the want of it is made such negligence on the part of the traveller as to be assumed to have contributed to the loss, and thereby exonerate the innkeeper (*Pettigrew* v. *Barron*, 12 Wend. 324; *Giles* v. *Fauntleroy*, 18 Id. 216; *Martin* v. *Brown*, 1 Cals. 225; *Fowler* v. *Dorlon*, 24 Barb. 384). In the case last cited (*Fowler* v. *Dorlon*) it was held to be such negligence in the traveller, who delivered his valise containing money to a servant of the innkeeper, not to have informed him of the fact, as to deprive him of the right of recovery for its loss. In this case, therefore, unless a special contract was made by the delivery by the plaintiff of the package of valuables in question to the clerk of the defendants on the occasion proved, the question of notice will be essential. If no special contract was made, and no notice given, the liability of the defendants would depend upon precisely the same principles as if the package in question had been taken from the plaintiff's room in the inn of the defendants.

If any special contract was entered into by the transaction between the plaintiff and the clerk on the occasion in question of the delivery of the package to the latter, it could only have been by virtue of some authority given to the latter to make such contract. The safe in which the plaintiff requested such package to be deposited, was one provided by the defendants, pursuant to the provisions of the statute of 1855, already referred to, and such clerk was not authorized to make any other contract except that to be implied from the mere receipt and deposit of the package in such safe, exactly in the condition in which it was. No authority was proved or found to have been given to him to agree to become responsible for parcels of unknown value. The notice posted in the hotel of the defendants required a package to be deposited to be "properly labelled," and the clerk informed the plaintiff "that they made their guests describe the property before redelivery." It was therefore only for packages properly labelled the defendants undertook to be responsible, and it was only of such property as could be described their clerk undertook to take care. If the defendants were not responsible for the contents of such package before it was deposited in such safe, while in their hotel, I do not think the clerk who received it was authorized to make, or did make on their behalf, a special contract for its safe keeping at all hazards, especially when without any compensation commensurate with the risk.

This case, therefore, resolves itself into the question, whether the plaintiff, by depositing in the safe of the defendants the package which he delivered to their clerk, under the circumstances under which he so deposited it, and with no more notice of its value than was given in his conversation with him at the time of such delivery, was not guilty of such negligence, or did not so violate the implied condition of the liability of the defendants as to exempt them entirely therefrom. A notice, to be sufficient to relieve the plaintiff from the imputation of negligence, should be not only of the kind of property, but its value. Otherwise, if the innkeeper was upon other principles not bound to accept its custody, he could not fix his compensation for the voluntary risk assumed by him, and would not increase his vigilance and precautions to prevent a loss. The package was sealed up, and marked only with the plaintiff's name, which furnished no information. The plaintiff, upon being asked what it was, answered merely "money," which is equally unsatisfactory and indefinite. Besides, the defendants notified him that, if their safe was to be used as a depository, packages deposited in it were to be "properly labeled," which, of course, involved a description of their contents, or a statement of their value. The mere information that a package contained "money," without knowledge of the amount, would not necessarily arouse the increased vigilance of the defendants. Indeed, the whole conduct of the plaintiff, including his mode of carrying the property in question, the time and place selected for changing the envelope, the sealing up with no external mark but his name, his curt reply to the question, what it was, indicate rather a reluctance to make known its value. Such acts were deficient in candour to the defendants, whose safe he chose to make the depository of his capital in business, instead of the vaults of a bank. True, he might have lost such package, even if its contents had been disclosed, and yet the defendants might have had their attention attracted to it if it had been properly labelled. By not giving proper notice, the plaintiff must

be presumed to have trusted to the safety of his place of deposit and the honesty of the clerk, rather than the responsibility of the defendants.

I am, therefore, of opinion the defendants are only liable for the amount lost by the plaintiff equal to his travelling expenses, as found by the jury; the general verdict, which is controlled by such special finding, must be reduced to that sum, and the exceptions as to the amount beyond that sustained: the other exceptions, being untenable, must be overruled, and judgment rendered for the amount so found.

Garvin, J., concurred.

DISSENTING OPINION.

Mr. Justice McCunn delivered the following dissenting opinion:

I confess to having considered this case anxiously, and I may say, with more than ordinary attention and research, for the reason that the Chief Justice has seriously changed his first views in the premises, and also from having great reluctance in putting forword my views in opposition to two of the learned justices of this court; yet I have been unable to bring my mind to the same conclusions as those recently entertained and promulgated as the opinion of the court in this case at General Term.

There is but one important question in this case; and that question is, whether Mr. Earle, as innkeeper, is liable, under the circumstances, for the large amount of money deposited with him by plaintiff?

The facts appear to be as follows:

On the 20th of April, 1863, Mr. Wilkins, the plaintiff, came to this city and went to Earle's Hotel; he registered his name and asked for a room, and was told that the house was crowded, and that he could get a bed but not a single room, and he was assigned to room No. 124; in the room was the following notice:

"Guests are cautioned against leaving money or valuables in their rooms, as the proprietors will not be responsible for them. All packages of value should be properly labeled and deposited in an iron safe, which is kept in the office for that purpose.

"Guests will please comply with the above requests, or the proprietors are relieved in case of loss from all responsibility." After said notice followed a copy of the Law of 1855, relative to innkeepers.

On the same evening, the plaintiff handed a package to a clerk in the office named Howard. Howard picked the package up, and asked Wilkins what it was. Wilkins said it was money, which he wished deposited in the safe.

The clerk then, in plaintiff's presence, procured the key of the safe, opened it, deposited the package, and locked it. Plaintiff asked him for a check. The clerk said they gave no checks, but required guests to identify their packages, and assured plaintiff no accident had ever occurred. One of the proprietors was in the office at the time, and plaintiff thinks Howard obtained the key from him. Early the next morning, before Mr. Earle was up, Howard went to Earle's room and asked him for the key of the safe, which was given. Afterwards, when Mr. Earle came down, he found the safe locked, and, as he alleges, Howard had absconded, and had taken the money of plaintiff with him, together with other moneys deposited in the safe.

These are the facts, and the simple and only question in the case is, whether, under the circumstances, Mr. Earle, the defendant, is liable in law as innkeeper to the plaintiff for the entire amount of $20,000, so received by him and deposited in his safe, or only liable for enough to cover travelling expenses, to wit: $1,000? I am clearly of opinion, that he is liable to the plaintiff to the full extent of $20,000 with interest, and my conclusions to that effect have been strengthened and confirmed by the fact, that all the cases in the English and American books for nearly the last three hundred years go, beyond a doubt, to establish the fact of his entire liability, for not one solitary case can be found sustaining the theory of a limited responsibility.

Indeed, the learned Chief Justice admits that all the cases cited in his opinion go to show, that to a certain extent, innkeepers are liable, but says we are at sea about the extent of the liability, and cites a number of cases, all of which I am compelled to say, are unlike the one at bar. According to my understanding of these cases, the innkeeper is clearly liable, but the Chief Justice maintains that none of those cases fixes or limits the extent of the liability. I think they all fix the liability to any amount the traveller may have with him in the inn. It is a well-established principle, that in the amount charged for the keep and board of the traveller, the innkeeper receives the consideration for the safe keeping of his guest, his goods, and his money; 2 Kent's Com. 758, 7th ed.; *Lane* v. *Cotton*, 12 Mod. 483, 487; *The Berkshire Woollen Co.* v. *Proctor*, 7 Cushing, 417; *Mason* v. *Thompson*, 12 Peck, 280; *Bennett* v. *Muller*, 5 Term R. 278; and this principle runs through all the cases to the present time.

The common law fixes an implied contract between the innkeeper and his guest. The innkeeper is to entertain and keep safely the guest, his money and his goods. The traveller, in consideration thereof, is bound to pay the price demanded for such entertainment, and the safe keeping of himself, his money and goods received at the inn are by law pledged to the innkeeper, for the fulfillment of his part of the contract, and it cannot therefore be said there is no consideration passing from the traveller to his host for the risk or liability incurred by the innkeeper.

This has been an undisputed principle of law for hundreds of years past, and the question that now arises is, does the statute of 1855 change this principle? The act simply says, there is to be a safe in this inn, under the absolute, especial, and immediate control of the innkeeper, his agents and servants, and unless the guest deposits his money in that safe the innkeeper is not responsible, and the rule of law is clear, that if the guest does deposit his money in that safe, the innkeeper is certainly liable to protect him against the theft of himself or servants. Any other rule of law would place the traveller at the mercy of a dishonest innkeeper and his dishonest servants without a remedy, and public policy calls for the inflexible enforcement of such a rule of law, although occasionally it may work harshly. It must be conceded that before the

law of 1855 was enacted, if a guest came to an inn, and took with him to his room $20,000, and the innkeeper's servants or agents break in and rob the guest, the innkeeper was held liable, and surely if the law of 1855 compels the guest to place that money under the absolute and immediate control of the innkeeper and his dishonest servant, he is doubly responsible, because, if this trap of a safe had not been there, the traveller might have protected his money in his room with his own means of protection. The act, undoubtedly, was to relieve the inkeeper from responsibility, where the guest was robbed of his money or goods, while they were in the room. I, therefore hold, that where the guest complies with the law of 1855, as in this case, the innkeeper should be held to a more strict accountability than he was before the law was passed. This being so, it is quite clear that the same principle that would make him liable for $10 would make him liable for $10,000. If this were not the rule, how absurd it would be to compel a traveller, under the Act of 1855, to hand an innkeeper $20,000 for safe keeping, and have the innkeeper say next morning that he received that amount from him, put it in his safe, but it was lost through his negligence, and he could only give $1,000 instead of the $20,000. That is precisely this case.

*(To be continued.)*

## GENERAL CORRESPONDENCE.

*Registry laws—Chain of title—Record of heirs.*

To the Editors of the Law Journal.

Gentlemen,—The proposed changes in the Registry Law, while calculated to increase its efficiency, hardly, I think, embrace all the alterations to be desired. Would it not be well further to amend the law by providing some method by which the title of *heirs* should appear on the registry books? It seems to me an obvious defect in our system of registration that no such provision at present exists. Where title is claimed through an intestate a *hiatus* appears upon the face of the abstract, a link is wanting to complete the chain of the title which has to be supplied by outside proof. Would it not be advisable to adopt some plan by which all the evidence which would be necessary to enable the claimant to prove his claim in court should be placed on record and so preserved? Some such arrangement, besides affording the heir additional facilities for making a good title, would in many cases be a saving of trouble and expense to parties searching the books.

Yours respectfully,

T. Phillips Thompson.

St. Catharines, C. W., Sept. 7, 1865.

[Some such arrangement as our correspondent proposes would, if practicable, tend much to the completeness of records of title. We recommend the suggestion to the attention of our law makers.—Eds. L. J.]

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*Chattel mortgages—Charge for copying—When not done by clerk—Legality of charge for search when mortgage more than two years old.*

To the Editors of the Law Journal.

Gentlemen,—Will you give the public the benefit of your views on a matter about which there is a difference of opinion?

1st. When a party makes a search of a chattel mortgage, and takes certain extracts (*e. g.*, date, parties, and articles mortgaged), have I any right to charge him more than 10 cents? The party does not want a copy of the mortgage at all, but simply for his information takes a short memorandum of those particulars.

2nd. Have I any right to charge 50 cents if the chattel mortgage is more than two years old, on the ground (*vide* C. C. Tariff of Fees) that it is a search "exceeding two years," or a "general search," which the tariff provides for?—"Every search exceeding two years, or a general search, 50 cents." Some lawyers say that this has reference only to searches in suits, and that I have no right to charge 50c., but must be guided by the charges given by the Chattel Mortgage Act.

I want only what is right, and as different clerks have different views, please answer.

A Clerk.

Sept. 21, 1865.

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[Clerks of County Courts, with whom chattel mortgages, &c., are filed, can only charge the fees by law allowed for services performed in regard to such chattel mortgages, &c. They are as follows:

1. For filing each instrument and affidavit, and for entering the same in the book, twenty-five cents.

2. For searching for each paper, ten cents.

3. For copies of any document, with certificate prepared, ten cents for every hundred words.—(Con. Stat. U. C. cap. 45, sec. 14.)

It will be observed that the act does not in terms make it obligatory upon the clerk to allow a person making a search to take a copy or extract. Hence some clerks refuse this

privilege, unless upon the terms of payment for the copy or extract, as if made by themselves.

We have always doubted the legality of this exaction, and would be glad to find it contested and decided. Any one, upon payment of ten cents, has a right to search for and to see the instrument filed. When he sees it he has a right to read it. He has a right to recollect the entire contents of it, and, if his memory is a good one, from memory write it out in the same room, or in the next room. Why should he not be allowed, without extra cost, to aid his memory by the use of a pen or pencil? The copy or extract may or may not be correct, but the clerk is in no way responsible for its correctness. Where he does no work, and assumes no responsibility for the work done, it is difficult to understand why he should be allowed to charge for it, as if done by himself and certified as correct.

The charge of fifty cents for a chattel mortgage more than two years old, is wholly indefensible. The tariff has no reference whatever to chattel mortgages.—Eds. L. J.]

## MONTHLY REPERTORY.

### CHANCERY.

M. R. May 8.

Re Sadd.

*Solicitor and client—Taxation—Costs incurred before retainer—Composition deed.*

A solicitor was retained by a debtor to prepare a composition deed, the first trust of which provided for the costs of its preparation. The trustees accepted the trusts, and various sums were received and paid by the solicitor on account of the trustees. The trustees obtained a common order for taxation of the solicitor's bill of costs.

*Held*, that the solicitor was entitled to set off against his receipts the costs of and attending the preparation of the deed, though incurred prior to the retainer by the trustees, and though no action could be maintained for them against the trustees. (13 W. R. 1009.)

M. R. Banks v. Gibson. July 21.

*Partnership—Dissolution—Right to use name of firm.*

On the dissolution of a partnership each partner is, in the absence of any special agreement, entitled to trade under the name or style of the old firm.

The plaintiff's husband, B., and the defendant for many years carried on business under the style of B. & Co. The plaintiff, on the death of her husband, continued the partnership in pursuance of a proviso in the articles of partnership. The plaintiff and defendant afterwards dissolved partnership by mutual consent, and no stipulation was made with respect to the use of the name of the firm. The defendant continued to trade under the style of B. & Co., while the plaintiff traded in her own name B. It was proved that orders intended for the plaintiff were sent to the defendant, but no fraud was established.

*Held*, that the plaintiff was not entitled to an injunction to restrain the defendant from trading as B. & Co. (13 W. R. 1012.)

M. R. Grant v. Grant. July 10.

*Married woman—Gifts by husband to wife—Separate property—Evidence of voluntary gifts.*

In order to establish the fact of a gift of chattels from a husband to his wife, there must be clear and distinct evidence corroborative o the wife's testimony. It is not necessary that he should deliver them to a trustee for his wife; it is sufficient if he constitutes himself a trustee for her by making the gift in the presence of a witness, or by subsequent statements to a witness that he has made the gift: but a mere declaration of intention to give is not sufficient.

*Semble*, presents made by a husband to his wife, whether in contemplation of or subsequent to their marriage, are the separate property of the wife, and do not form part of the husband's personal estate.

Observations on the evidence necessary to support a voluntary gift. (13 W. R. 1057.)

## APPOINTMENTS TO OFFICE.

### COUNTY JUDGE.

GEORGE SHERWOOD, Esquire, commonly called the Hon. George Sherwood, to be Judge of the County Court of the County of Hastings. (Gazetted Sept. 2, 1865.)

### NOTARIES PUBLIC.

HIRAM McCREA, of Frankville, Esquire, to be a Notary Public in Upper Canada. (Gazetted Sept. 16, 1865.)

THOMAS PHILLIPS THOMSON, of St. Catharines, Esq., Attorney-at-Law, to be a Notary Public in Upper Canada. (Gazetted Sept. 23, 1865.)

ANDREW THOMAS DRUMMOND, of Kingston, Esquire, Barrister-at-law, to be a Notary Public in Upper Canada. (Gazetted Sept. 23, 1865.)

FRANCIS EDWIN KILVERT, of the City of Hamilton, Esquire, Attorney-at-Law, to be a Notary Public in Upper Canada. (Gazetted Sept. 23, 1865.)

THOMAS FERRIS NELLIS, of the City of Ottawa, Esq., Barrister-at-Law, to be a Notary Public in Upper Canada. (Gazetted, Sept. 23, 1865.)

### CORONERS.

JESSE SHIBLEY, Esquire, Associate Coroner, County of Lennox and Addington. (Gazetted Sept. 2, 1865.)

DUGALD L. McALPINE, Esquire, M.D., Associate Coroner County of Middlesex. (Gazetted Sept. 2, 1865.)

JOHN HARRIS COMFORT, Esquire, M.D., Associate Coroner, County of Lincoln. (Gazetted Sept. 16, 1865.)

JOHN FERGUSSON, of Appin, Esquire, M.D, Associate Coroner, County of Middlesex. (Gazetted Sept. 23, 1865.)

JOHN R. ASH, of Centreville, Esquire, M.D., Associate Coroner for the United Counties of Lennox and Addington. Gazetted Sept. 23, 1865.)

## TO CORRESPONDENTS.

"T. Phillips Thompson"—"A Clerk"—Under "General Correspondence."

"Rate-payer" in current number of *Local Courts' Gazette*.

## DIARY FOR NOVEMBER.

1. Wed.... *All Saints.*
4. Sat. ... Articles, &c., to be left with Sec. Law S.
5. SUN ... 21st *Sunday after Trinity.*
12. SUN ... 22nd *Sunday after Trinity.*
15. Wed ... Last day for service for County Court.
19. SUN ... 23rd *Sunday after Trinity.*
20. Mon ... Michaelmas Term begins.
24. Frid.... Paper Day Q. B. New Trial Day C. P.
15. Sat .... Paper Day C. P. N. T. Day Q. B. Declare for [Co. Ct.
26. SUN... *24th Sunday after Trinity.*
27. Mon ... Paper Day Q. B. New Trial Day C. P.
28. Tues... Paper Day C. P. New Trial Day Q. B.
29. Wed ... Paper Day Q. B. New Trial Day C. P.
30. Thurs. *St. Andrew.* Paper Day C. P.

## NOTICE.

*Owing to the very large demand for the* Law Journal *and* Local Courts' Gazette, *subscribers not desiring to take* both *publications are particularly requested at once to return the back numbers of that one for which they do not wish to subscribe.*

THE

# Upper Canada Law Journal.

NOVEMBER, 1865.

## THE HON. ARCHIBALD McLEAN.

More than two years and a half ago it was our melancholy duty to chronicle the death of one whose name will ever be remembered with respect and affection by all true hearted Canadians, Sir John Beverley Robinson. Second only to his memory will be that of his tried friend, his brother in arms and his brother judge, the Hon. Archibald McLean who expired at his residence in Toronto on Tuesday, the 24th day of October last, at the advanced age of seventy-five.

The father of Archibald McLean was the Hon. Neil McLean, a member of the Legislative Council for Upper Canada before the Union: his mother was a daughter of Colonel Macdonald. He was born at St. Andrews, near Cornwall, in April, 1791. Like Sir John Robinson and many others who have attained a conspicuous position in Canadian history, he was a pupil of Dr. Strachan, the present venerable Bishop of Toronto, at the town of Cornwall. He left this to study law, which he did in Toronto, then York, in the office of Attorney General Firth. As to his success or application in these early studies we know but little; whatever they were they were cut short by the breaking out of the war of 1812. The son of an officer in the 84th Highlanders, and the grandson on his mother's side of a U. E. Loyalist, it needed no persuasion to induce him to take up arms in defence of his country.

He was identified with the struggles of that eventful period. He was a lieutenant in Captain Cameron's No. 1 flank company of York Militia at the battle of Queenston Heights. No. 2 flank company being on that day commanded by Lieut. John Beverley Robinson. He was severely wounded early in the engagement, during the temporary repulse that preceded the victory, whilst aiding Captain Dennis of the 49th in his endeavours to stop the retreat, but was helped off the field by Lieut. Stanton, the present Clerk of the Process, and other comrades, shortly after Sir Isaac Brock received his mortal wound.

He also behaved very gallantly at the engagement at York, saving the colors of the York Militia. He was present at the battle of Lundy's Lane, where he was taken prisoner, and so remained till the termination of the war.

On the breaking out of the Rebellion of 1837, the old military fire of the then lawyer, but former soldier revived, and on the morning of the day when the attack of the rebels on Toronto was expected, he might have been seen drilling a company of men hastily got together in front of the old City Hall, with the ardour of a quarter of a century before—the then Chief Justice of Upper Canada being in the ranks, shouldering his musket like any private.

He was called to the Bar and admitted as an attorney on 9th April, 1813, and was engaged in the successful practice of his profession until the year 1837, when he was appointed one of the judges of the Court of King's Bench along with the late Mr. Justice Jones, when the number of judges was increased from three to five, under the 7 Wm. IV. cap. 1.

Before his appointment to the Bench he represented his native county for several years in the Legislative Assembly for Upper Canada, and was for some time Speaker of the House, a position for which his dignified bearing and and courteous manners well fitted him.

He was throughout his parliamentary career a consistent advocate for the rights of the Presbyterian Church, of which he was an elder, during the struggle brought about by the proposed secularization of the clergy reserves. And this was the more creditable

to him, as he had to act in opposition to his own personal and political friends. He was violently assailed in the House of Assembly by Mr. Hagerman, then a member of the Government, for his conduct in this matter; but neither the withering language of the eloquent and impassioned speaker, nor the persuasions of his friends could prevent him taking the course which he considered right.

When the Court of Common Pleas was constituted in 1849, the late Sir James Macaulay was made Chief Justice, and Judge McLean and Judge Sullivan puisne judges of that court, by commission dated 15th December, 1849. He continued in this court until the resignation of Chief Justice Macaulay and the appointment of Judge Draper to the vacant office.

This appointment of his junior, which he looked upon as a slight, was a blow to the old judge which he felt acutely, and the consequence was, that in Hilary Term, 1856, he took his seat in the Queen's Bench. The step, however, was considered a judicious one by the profession as well as by the Attorney General, J. A. McDonald, though he, as well as others, expressed and felt much regret at the pain caused by the course which it was considered advisable to take, and all were well pleased to see Mr. McLean made Chief Justice of Upper Canada in the place of Sir John Robinson, who resigned his seat in the Queen's Bench and accepted the Presidency of the Court of Error and Appeal. Upon the death of the latter in January, 1863, Chief Justice McLean, then in failing health, again took his place, which he held till his death.

As a judge, though not perhaps possessing the brilliancy or application of some of his brethren, his opinions were always received with the respect and attention which his experience, and his character for unblemished impartiality and integrity claimed. His views generally coincided with those of his old friend Sir John, in whose judgment he placed the most unbounded confidence, and for whose character he had the greatest admiration. He joined with him when these two dissented from the rest of the Court of Appeal in the well known case of the *The City of Toronto* v. *Bowes*, — the decision, however, of the majority was upheld on an appeal to England.

The judgment of Judge McLean, in opposition to the opinion of Sir John Robinson and Judge Burns, in the celebrated *Anderson* case, is the most prominent feature in his judicial career, and deserves more than a passing notice. The facts of this case are familiar doubtless to most of our readers; they will be found reported in full in 20 U. C. Q. B. 124. Judge McLean took the broad ground, that in administering the laws of a British Province he was not bound "to recognize as law any enactment which could convert into chattels a very large number of the human race," and that a man endeavouring to effect his escape from slavery was entitled to use any means necessary for that purpose, even to taking the life of his pursuer, and that the crime with which Anderson was charged, even if it had been clearly made out, did not come within the Ashburton Treaty. Nor could he "recognise the law of slavery in Missouri to such an extent as to make it murder in Missouri, while it is justifiable in this Province to do precisely the same act."

Whatever may be the strict law of the case, and there are many even amongst lawyers who think that Judge McLean was right, one cannot help admiring the free British spirit so characteristic of the man, whose feelings doubtless were shared by his brethren, but by them kept subject to the rigid dictates of severe and calm judgment.

The manner of the late President of the Court of Appeal upon the Bench was dignified and courteous. Unsuspicious and utterly devoid of anything mean or petty in his own character, his conduct to others was always that which he expected from them.

The profession generally, the young student as well as the old practitioner, will long remember with affection his courtesy and forbearance in Chambers and on the Bench. Others will think of him as an entertaining and agreeable companion and a true friend; whilst others still will call to mind the stately form of the old judge, as he approached and entered St. Andrew's Church, where he was a constant and devout attendant, rain or sunshine, until his last illness, which terminated in death.

Archibald McLean was a man of remarkably handsome and commanding presence; tall, straight, and well formed in person, with a pleasant, handsome face, and a kind and courteous manner, he looked and was, every inch, a man and a gentleman. He belonged

to a race, most of whom have now passed away—the "giants" of Canada's early history. He was one of those honest, brave, enduring, steadfast men sent by Providence to lay the foundation of a country's greatness.

For the last few years Mr. McLean had been afflicted with partial paralysis, which, whilst it impaired his physical powers, left his intellect unclouded. For a long time however his iron frame resisted the attack of man's "last enemy," until having passed the span of life allotted to humanity, a general break up of the system took place, which, combined with his malady, at length carried him off. As he had lived, so did he die; calmly, courageously, and peacefully he went to stand before the Judge of all mankind, in the sure and certain hope of an eternity of joy and peace.

On the second day after his decease a meeting of the Benchers of the Law Society of Upper Canada took place in the Convocation Room at Osgoode Hall, for the purpose of taking such steps as were fitting under the circumstances. The Hon. John Ross was appointed chairman, when the following resolution was passed on the motion of Mr. John Crawford, seconded by Mr. Vankoughnet:

"That this meeting has heard with unfeigned regret of the death of the Honorable Archibald McLean, late President of the Court of Appeal, and as a mark of the high estimation in which he was held by the members of this society—be it resolved therefore, that a deputation do wait upon the family of the late President and request that the funeral do take place from Osgoode Hall and be conducted by this Society, and that the Hon. John Ross, and the mover and seconder compose such deputation."

A committee was also appointed to draft resolutions expressive of the feelings of respect and affection of the profession to the late President, and the mode of testifying the same.

On Saturday before the funeral a meeting of the Society was held to take into consideration the resolutions which had been accordingly prepared by the committee. The Hon. John Ross being again called to the chair, the following resolutions were passed:

Moved by Mr. Kenneth McKenzie, Q. C., seconded by Mr. Duggan, Q. C., and

"*Resolved*, That the members of the Law Society now assembled, desire to record their feeling of profound regret at the death of the Honorable Archibald McLean, President of the Court of Error and Appeal, and their sincere sympathy with his family in the great bereavement they have sustained. In paying this humble tribute to his virtues as a Judge, and his worth as a man, they are but giving feeble utterance to the sentiments of the whole profession. His great public services, extending over nearly half a century of our country's history, and embracing offices of the highest trust, will cause his loss to be widely mourned, but by no part of the community as much as by the members of the bar, with whom he was so long and so intimately associated. By the upright and conscientious discharge of his judicial duties, he gained the confidence and secured the esteem of his fellow citizens; by a happy union of courtesy with dignity, he inspired affection, as well as respect, in those who practised before him, and thus helped to foster the spirit of mutual regard and cordial coöperation between the bench and the bar, which distinguishes the administration of justice in Upper Canada."

Moved by Mr. Gamble, seconded by Mr. Brough, Q C., and *resolved*,—

"2. That the members of the Law Society shall wear crape on their left arm for a month, as a testimonial of respect and affection for his memory."

Moved by Mr. Crawford, seconded by Mr. Alexander Cameron, and *resolved*,—

"3. That the treasurer be requested to transmit a copy of the first resolution to Mrs. McLean."

Moved by Mr. Roaf, Q. C., seconded by Mr. Crooks, Q. C., and *resolved*,—

"That the Treasurer do lay these resolutions before the Convocation, and on behalf of this meeting request their insertion in the minutes of the proceedings of the Society."

The corpse, attended by personal friends, was taken from his residence on Peter Street to Osgoode Hall, where the funeral was arranged under the direction of the Law Society. Shortly after two o'clock the burial service of the Presbyterian Church was performed by the Rev. Dr. Barclay, when the coffin was placed in the hearse and the procession moved off. The pall-bearers were: The Chancellor of Upper Canada, Ex-Chancellor Blake, Mr. Justice Morrison, Mr. Justice Adam Wilson, and Mr. Vice-Chancellor Mowat. The procession was composed of the Bishop of Toronto, such of the Judges of the Superior Court as their duties on circuit permitted to attend, the Hon. S. B. Harrison, and others holding

public positions, the Mayor and Corporation, the members of St. Andrew's Society, of which the deceased had been President for several years, and the members of the bar, in their robes, besides a large number of citizens generally. The funeral was a very large one, and would have been much larger but for the inclemency of the weather, and from the fact that a number of the profession were out of town on circuit, and many from the country were for the same reason prevented from attending.

The funeral cortege proceeded to the Necropolis, where, amidst the sorrow of all who knew him, were deposited the mortal remains of the Honorable Archibald McLean, the brave soldier, the upright judge, and the Christian gentleman.

## JUDICIAL CHANGES.

The death of the late lamented President of the Court of Appeal, will probably cause some changes on the Bench. Rumour has it that the present Chief Justice of Upper Canada will take the vacant office and obtain that repose, partial though it be, which he so well merits. His place, it is also said, may then be filled by the Chancellor. Both these appointments would be unexceptionable, provided the right man be found for the then vacant Chancellorship, should its present able occupant care to leave the Equity Bench. A short time will however probably solve the question, as the event that has just taken place has long been expected, and those in authority have had plenty of time to make up their minds.

Should any vacancy occur in the present Bench of Judges, either of Law or Equity, the following gentlemen, amongst others, have been spoken of as likely men for the place: John W. Gwynne, Q.C., Thomas Galt, Q.C., Stephen Richards, Q.C., and S. B. Freeman, Q.C. It is very possible, however, that the learned Chief Justice may, at least for a year or two, still give the country the benefit of his services in his present position. We heartily hope he may.

## ACTS OF LAST SESSION.

It seems probable that the Acts of last Session will not be printed and distributed for some little time yet, owing to the removal of the Government offices and their pharaphrnalia, from Quebec to Ottawa. With this in view, we published in our last number several Acts of interest to our professional brethren, and to the public generally. We called attention amongst others, to the Act amending the law of property and trusts in Upper Canada, but had no space then to insert it. It has been suggested to us, to publish it in this impression, which, as it contains many important alterations in the law, and as many are anxious to see it, we now do.

### An Act to amend the Law of Property and Trusts in Upper Canada.

[Assented to 18th September, 1865.]

Her Majesty, by and with the advice and consent of the Legislative Council and Assembly of Canada, enacts as follows:

#### LEASES.

1.—Where any license to do any act which, without such license, would create a forfeiture, or give a right to re-enter, under a condition or power reserved in any lease heretofore granted, or to be hereafter granted, shall at any time after the passing of this Act, be given to any lessee or his assigns, every such license shall, unless otherwise expressed, extend only to the permission actually given, or to any specific breach of any proviso or covenant made or to be made, or to the actual assignment, under-lease, or other matter thereby specifically authorized to be done, but not so as to prevent any proceeding for any subsequent breach (unless otherwise specified in such license); and all rights under covenants and powers of forfeiture and re-entry in the lease contained, shall remain in full force and virtue, and shall be available as against any subsequent breach of covenant or condition, assignment, underlease, or other matter not specifically authorized or made dispunishable by such license, in the same manner as if no such license had been given and the condition or right of re-entry shall be and remain in all respects as if such license had not been given, except in respect of the particular matter authorized to be done.

2.—Where in any lease heretofore granted or to be hereafter granted, there is or shall be a power or condition of re-entry on assigning or underletting or doing any other specified act without license, and a license at any time after the passing of this Act shall be given to one of several lessees or co-owners to assign or underlet his share or interest, or to do any other act prohibited to be done without license, or shall be given to any lessee or owner, or any one of several lessees or owners to assign or underlet part only of the property, or to do any other such act as aforesaid in respect of part only of such property such license shall not operate to destroy or extinguish the right of re-entry in case of any breach of the covenant or condition by the co-lessee or co-lessees

or owner or owners of the other shares or interests in the property, or by the lessee or owner of the rest of the property, (as the case may be), over or in respect of such shares or interests or remaining property, but such right of re-entry shall remain in full force over or in respect of the shares or interests or property not the subject of such license.

3.—Where any actual waiver of the benefit of any covenant or condition in any lease, on the part of any lessor, or his heirs, executors, administrators, or assigns, shall be proved to have taken place after the passing of this Act in any one particular instance, such actual waiver shall not be assumed or deemed to extend to any instance or any breach of covenant or condition other than that to which such waiver shall specially relate, nor to be a general waiver of the benefit of any such covenant or condition, unless an intention to that effect shall appear.

4.—Where the reversion upon a lease is severed, and the rent or other reservation is legally apportioned, the assignee of each part of the reversion shall, in respect of the apportioned rent or other reservation allotted or belonging to him, have and be entitled to the benefit of all conditions or powers of re-entry for non-payment of the original rent or other reservation, in like manner as if such conditions or powers had been reserved to him as incident to his part of the reservation in respect of the apportioned rent or other reservation allotted or belonging to him.

POLICIES OF INSURANCE.

5.—The Court of Chancery shall have power to relieve against a forfeiture for breach of a covenant or condition to insure against loss or damage by fire, where no loss or damage by fire has happened, and the breach has, in the opinion of the Court, been committed through accident or mistake, or otherwise without fraud or gross negligence, and there is an insurance on foot at the time of the application to the Court, in conformity with the covenant to insure, upon such terms as to the Court may seem fit.

6.—The Court, where relief shall be granted, shall direct a record of such relief having been granted to be made by endorsement on the lease or otherwise.

7.—The person entitled to the benefit of a covenant on the part of a lessee or mortgagor to insure against loss or damage by fire, shall, on loss or damage by fire happening, have the same advantage from any then subsisting insurance relative to the building or other property covenanted to be insured, effected by the lessee or mortgagor in respect of his interest under the lease or in the property, or by any person claiming under him, but not effected in conformity with the covenant, as he would have from an insurance effected in conformity with the covenant.

8.—Where on the *bona fide* purchase after the passing of this Act, of a leasehold interest under a lease containing a covenant on the part of the lessee to insure against loss or damage by fire, the purchaser is furnished with the written receipt of the person entitled to receive the rent, or his agent, for the last payment of the rent accrued due before the completion of the purchase, and there is subsisting at the time of the completion of the purchase, an insurance in conformity with the covenant, the purchaser or any person claiming under him, shall not be subject to any liability by way of forfeiture or damage or otherwise, in respect of any breach of the covenant committed at any time before the completion of the purchase, of which the purchaser had not notice before the completion of the purcease; but this provision is not to take away any remedy which the lessor or his legal representatives may have against the lessee or his legal representatives for breach of covenant.

9.—The preceding provisions shall be applicable to leases for a term of years absolute, or determinable on a life or lives, or otherwise, and also to a lease for the life of the lessee or the life or lives of any other person or persons.

RENT CHARGES.

10.—The release from a rent-charge, of part of the hereditaments charged therewith shall not extinguish the whole rent-charge, but shall operate only to bar the right to recover any part of the rent-charge out of the hereditaments released, without prejudice, nevertheless, to the rights of all persons interested in the hereditaments remaining unreleased, and not concurring in or confirming the releases.

POWERS.

11.—A deed hereafter executed in the presence of, and attested by two or more witnesses in the manner in which deeds are ordinarily executed and attested, shall, so far as respects the execution and attestation thereof, be a valid execution of a power of appointment by deed or by any instrument in writing, not testamentary, notwithstanding it shall have been especially required that a deed or instrument in writing, made in exercise of such power, should be executed or attested with some additional or other form of execution or attestation or solemnity; Provided always, that this provision shall not operate to defeat any direction in the instrument creating the power, that the consent of any particular person shall be necessary to a valid execution, or that any act shall be performed in order to give validity to any appointment, having no relation to the mode of executing and attesting the instrument; and nothing herein contained shall prevent the donor of a power from executing it conformably to the power, by writing or otherwise, than by an instrument executed and attested as an ordinary deed, and to any such execution of a power, this provision shall not extend.

12.—Where, under a power of sale, a *bona fide* sale shall be made of an estate, with the timber thereon, or any other articles attached thereto, and the tenant for life, or any other party to the transaction shall, by mistake, be allowed to receive for his own benefit a portion of the purchase money or value of the timber or other articles, it shall be lawful for the Court of Chancery, upon any bill or claim or application in a summary way, as the case may require or permit, to declare that upon payment by the purchaser or the claimant under him, of the full value of the timber and articles at the time of sale, with such interest thereon as the Court shall direct, and the settlement of the said principal moneys and interest under the direction of the Court, upon such parties, as in the opinion of the Court shall be entitled thereto, the said sale ought to be established; and upon such payment and settlement being made accordingly, the Court may declare that the said sale is valid, and thereupon the legal estate shall vest and go in like manner as if the power had been duly executed, and the costs of the said application, as between solicitor and client, shall be paid by the purchaser or the claimant under him.

13.—Where, by any will which shall come into operation after the passing of this Act, the testator shall have charged his real estate or any specific portion thereof, with the payment of his debts, or with the payment of any legacy or other specific sum of money, and shall have devised the estate so charged to any trustee or trustees for the whole of his estate or interest therein, and shall not have made any express provision for the raising of such debt, legacy, or sum of money out of such estate, it shall be lawful for the said devisee or devisees in trust, notwithstanding any trusts actually declared by the testator, to raise such debt, legacy or money as aforesaid by a sale and absolute disposition, by public auction or private contract, of the said hereditaments or any part thereof, or by a mortgage of the same, or partly in one mode and partly in the other, and any deed or deeds of mortgage so executed, may reserve such rate of interest, and fix such period or periods of repayment as the person or persons executing the same shall think proper.

14.—The powers conferred by the last section shall extend to all and every person or persons in whom the estate devised shall for the time being be vested by survivorship, descent or devise, or to any person or persons who may be appointed under any power in the will, or by the Court of Chancery, to succeed to the trusteeship vested in such devisee or devisees in trust as aforesaid.

15.—If any testator who shall have created such a charge as is described in the thirteenth section, shall not have devised the hereditaments charged as aforesaid, in such terms as that his whole estate and interest therein shall become vested in any trustee or trustees, the executor or executors for the time being named in the will, if any, shall have the same or the like power of raising the said moneys as is hereinbefore vested in the devisee or devisees in trust of the said hereditaments, and such power shall from time to time devolve to and become vested in the person or persons (if any) in whom the executorship shall, for the time being, be vested; but any sale or mortgage under this Act shall operate only on the estate and interest, whether legal or equitable, of the testator, and shall not render it unnecessary to get in any outstanding subsisting legal estate.

16.—Purchasers or mortgagees shall not be bound to inquire whether the powers conferred by sections thirteen, fourteen and fifteen of this Act, or either of them, shall have been duly and correctly exercised by the person or persons acting in virtue thereof.

17.—The provisions contained in sections thirteen, fourteen, fifteen and sixteen, shall not in any way prejudice or affect any sale or mortgage already made or hereafter to be made, under or in pursuance of any will coming into operation before the passing of this Act, but the validity of any such sale or mortgage shall be ascertained and determined in all respects as if this Act had not passed; and the said several sections shall not extend to a devise to any person or persons in fee or in tail, or for the testator's whole estate and interest charged with debts or legacies; nor shall they affect the power of any such devisee or devisees to sell or mortgage as he or they may by law now do.

PROVISIONS FOR CASES OF FUTURE AND CONTINGENT USES.

18.—Where by any instrument any hereditaments have been or shall be limited to uses, all uses thereunder, whether expressed or implied by law, and whether immediate or future, or contingent or executory, or to be declared under any power therein contained, shall take effect when and as they arise by force of and by relation to the estate and seizin originally vested in the person seized to the uses, and the continued existence in him or elsewhere of any seizin to uses or *scintilla juris*, shall not be deemed necessary for the support of, or to give effect to future or contingent or executory uses; nor shall any such seizin to uses or *scintilla juris* be deemed to be suspended, or to remain or to subsist in him or elsewhere.

ASSIGNMENT OF PERSONALTY.

19.—Any person shall have power to assign personal property, now by law assignable, including chattels real, directly to himself and another person or other persons or corporation, by the like means as he might assign the same to another.

FRAUDS ON SALES AND MORTGAGES.

20.—Any seller or mortgagor of land, or of any chattels, real or personal, or choses in ac-

tion, conveyed or assigned to a purchaser or mortgagee, or the solicitor or agent of any such seller or mortgagor, who shall, after the passing of this Act, conceal any settlement, deed, will or other instrument material to the title, or any incumbrance, from the purchaser or mortgagee, or falsify any pedigree upon which the title does or may depend, in order to induce him to accept the title offered or produced to him, with intent in any of such cases to defraud, shall be guilty of a misdemeanor, and being found guilty, shall be liable, at the discretion of the court, to suffer such punishment, by fine or by imprisonment for any time not exceeding two years, with or without hard labor, or by both, as the court shall award, and shall also be liable to an action for damages at the suit of the purchaser or mortgagee, or those claiming under the purchaser or mortgagee, for any loss sustained by them or either or any of them, in consequence of the settlement, deed, will or other instrument or incumbrance so concealed, or of any claim made by any person under such pedigree, but whose right was concealed by the falsification of such pedigree; and in estimating such damages where the estate shall be recovered from such purchaser or mortgagee, or from those claiming under the purchaser or mortgagee, regard shall be had to any expenditure by them, or either or any of them, in improvements on the land; but no prosecution for any offence included in this section, against any seller or mortgagor, or any solicitor or agent, shall be commenced without the sanction of Her Majesty's Attorney General for Upper Canada, or in case that office be vacant, of Her Majesty's Solicitor General for Upper Canada; and no such sanction shall be given without such previous notice of the application for leave to prosecute, to the person intended to be prosecuted, as the Attorney General or the Solicitor General (as the case may be) shall direct; and no prosecution for concealment shall be sustained unless a written demand of an abstract of title was served by or on behalf of the purchaser or mortgagee before the completion of the purchase or mortgage.

INTERPRETATION CLAUSE.

21.—In the construction of the previous provisions in this Act, the term "land" shall be taken to include all tenements and hereditaments, and any part or share of or estate or interest in any tenements or hereditaments, of what tenure or kind soever; and

The term "mortgage" shall be taken to include every instrument by virtue whereof land is in any manner conveyed, assigned, pledged or charged as security for the repayment of money or money's worth lent, and to be reconveyed, re-assigned or re-leased on satisfaction of the debt; and

The term "mortgagor" shall be taken to include every person by whom any such conveyance, assignment, pledge or charge as aforesaid shall be made; and

The term "mortgagee" shall be taken to include every person to whom or in whose favour any such conveyance, assignment, pledge or charge as aforesaid is made or transferred.

POWERS OF ATTORNEY.

22.—A power of attorney executed by a married woman for the sale or conveyance of any real estate of or to which she is seized or entitled in Upper Canada, or authorizing the attorney to execute a deed barring or releasing her dower in any lands or hereditaments in Upper Canada, shall be valid both at law and in equity; provided, (1) that she be examined and a certificate indorsed on the power of attorney, as required in regard to deeds and conveyances by a married woman under the Consolidated Statutes for Upper Canada respectively intituled, "An Act respecting Dower," and "An Act respecting the conveyance of real estate by married women;" and provided (2) that her husband is a party to and executes such power of attorney or the deed or other instrument executed in pursuance thereof, where the power is for the sale or conveyance of her real estate.

23.—In case a power of attorney for the sale or management of real or personal estate, or for any other purpose, provides that the same may be exercised in the name and on the behalf of the heirs or devisees, executors or administrators of the person executing the same, or provides by any form of words, that the same shall not be revoked by the death of the person executing the same, such provision shall be valid and effectual to all intents and purposes both at law and in equity, according to the tenor and effect thereof, and subject to such conditions and restrictions, if any, as may be therein contained.

24.—Independently of any such special provision in a power of attorney, every payment made and every act done under and in pursuance of any power of attorney, or any power, whether in writing or verbal, and whether expressly or impliedly given, or an agency expressly or impliedly created after the death of such person who gave such power or created such agency, or after he has done some act to avoid the power or agency, shall, notwithstanding such death or act last aforesaid, be valid as respects every person party to such payment or act, to whom the fact of the death, or of the doing of such act as last aforesaid was not known at the time of such payment or act *bonâ fide* done as aforesaid, and as respects all claiming under such last mentioned person.

DISTRIBUTION OF ASSETS.

25.—Where an executor or administrator, liable as such to the rents, covenants or agreements contained in any lease or agreement for a lease granted or assigned to the testator or

intestate whose estate is being administered, shall have satisfied all such liabilities under the said lease or agreement for a lease, as may have accrued due and been claimed up to the time of the assignment hereinafter mentioned, and shall have set apart a sufficient fund to answer any future claim that may be made in respect of any fixed and ascertained sum covenanted or agreed by the lessee to be laid out on the property demised, or agreed to be demised, although the period for laying out the same may not have arrived, and shall have assigned the lease or agreement for a lease to a purchaser thereof, he shall be at liberty to distribute the residuary personal estate of the deceased to and amongst the parties entitled thereto respectively without appropriating any part, or any further part (as the case may be) of the personal estate of the deceased, to meet any future liability under the said lease or agreement for a lease; and the executor or administrator so distributing the residuary estate shall not, after having assigned the said lease or agreement for a lease, and having, where necessary, set apart such sufficient fund as aforesaid, be personally liable in respect of any subsequent claim under the said lease or agreement for a lease; but nothing herein contained shall prejudice the right of the lessor or those claiming under him, to follow the assets of the deceased into the hands of the person or persons to or amongst whom the said assets may have been distributed.

26.—In like manner, where an executor or administrator, liable as such, to the rent, covenants or agreements contained in any conveyance on chief rent or rent-charge (whether any such rent be by limitation of use, grant, or reservation), or agreement for such conveyance, granted or assigned to or made and entered into with the testator or intestate whose estate is being administered, shall have satisfied all such liabilities under the said conveyance, or agreement for a conveyance, as may have accrued due and been claimed up to the time of the conveyance hereinafter mentioned, and shall have set apart a sufficient fund to answer any future claim that may be made in respect of any fixed and ascertained sum covenanted or agreed by the grantee to be laid out on the property conveyed, or agreed to be conveyed, although the period for laying out the same may not have arrived, and shall have conveyed such property, or assigned the said agreement for such conveyance as aforesaid, to a purchaser thereof, he shall be at liberty to distribute the residuary personal estate of the deceased to and amongst the parties entitled thereto respectively, without appropriating any part or any further part (as the case may be), of the personal estate of the deceased to meet any future liability under the said conveyance or agreement for a conveyance; and the executor or administrator so distributing the residuary estate shall not, after having made or executed such conveyance or assignment, and having, where necessary, set apart such sufficient fund as aforesaid, be personally liable in respect of any subsequent claim under the said conveyance or agreement for conveyance; but nothing herein contained shall prejudice the right of the grantor, or those claiming under him, to follow the assets of the deceased into the hands of the person or persons to or among whom the said assets may have been distributed.

27.—Where an executor or administrator shall have given such or the like notices as, in the opinion of the Court in which such executor or administrator is sought to be charged, would have been given by the Court of Chancery in an administration suit, for creditors and others to send in to the executor or administrator their claims against the estate of the testator or intestate, such executor or administrator shall, at the expiration of the time named in the said notices, or the last of the said notices, for sending in such claims, be at liberty to distribute the assets of the testator or intestate, or any part thereof, amongst the parties entitled thereto, having regard to the claims of which such executor or administrator has then notice, and shall not be liable for the assets or any part thereof so distributed to any person of whose claim such executor or administrator shall not have had notice of the time of distribution of the said assets, or a part thereof, as the case may be; but nothing in the present Act contained shall prejudice the right of any creditor or claimant to follow the assets, or any part thereof, into the hands of the person or persons who may have received the same respectively.

28.—On the administration of the estate of any person dying after the passing of this Act, in case of a deficiency of assets,—debts due to the Crown, and to the executor or administrator of the deceased person, and debts due to others, including therein respectively debts by judgment, decree or order, and other debts of record, debts by specialty, simple contract debts, and such claims for damages as by statute are payable in like order of administration as simple contract debts,—shall be paid *pari passu* and without any preference or priority of debts of one rank or nature over those of another. But nothing herein contained shall prejudice any lien existing during the lifetime of the debtor on any of his real or personal estate.

29.—In case the executor or administrator gives notice in writing to any creditor or other person of whose claims against the estate such executor or administrator has notice, or to the attorney or agent of such creditor or other person, that the said executor or administrator rejects or disputes such claim, it shall be the duty of the claimant to commence his suit in respect of such claim within six months after such written notice was given, in case the debt, or some part thereof, was due at the time of the notice, or within six months from the time the debt, or some part thereof, falls

due, if no part thereof was due at the time of the said notice; and in default the said suit shall be for ever barred.

LIMITATION IN INTESTACY.

30.—After the first day of January, one thousand eight hundred and sixty-six, no suit or other proceeding shall be brought to recover the personal estate, or any share of the personal estate of any person dying intestate, possessed by the legal personal representative of such intestate, but within the time within which the same might be brought to recover a legacy, that is to say, within twenty years next after a present right to receive the same shall have accrued to some person capable of giving a discharge for or release of the same, unless in the meantime some part of such estate or share, or some interest in respect thereof, shall have been accounted for or paid, or some acknowledgment of the right thereto shall have been given in writing, signed by the person accountable for the same, or his agent, to the person entitled thereto, or his agent; and in such case no such action or suit shall be brought but within twenty years after such accounting, payment or acknowledgment, or the last of such accountings, payments or acknowledgments, if more than one was made or given.

SUMMARY APPLICATIONS TO CHANCERY.

31.—Any trustee, executor or administrator shall be at liberty, without the institution of a suit, to apply by petition to any Judge of the Court of Chancery, or by summons upon a written statement to any such Judge in Chambers, for the opinion, advice, or direction of such Judge on any question respecting the management or administration of the trust property or the assets of any testator or intestate; such petition or statement to be accompanied by a certificate of counsel, to the effect that in his judgment the case stated is a proper one for the opinion, advice, or direction of the Judge under this Act, and such application to be served upon, or the hearing thereof to be attended by, all persons interested in such application or such of them as the said Judge shall think expedient; and the trustee, executor or administrator acting upon the opinion, advice or direction given by the said Judge, shall be deemed, so far as regards his own responsibility, to have discharged his duty as such trustee, executor or administrator, in the subject matter of the said application; Provided, nevertheless, that this Act shall not extend to indemnify any trustee, executor or administrator in respect of any act done in accordance with such opinion, advice or direction as aforesaid, if such trustee, executor or administrator shall have been guilty of any fraud or wilful concealment or misrepresentation in obtaining such opinion, advice, or direction; and the costs of such application as aforesaid shall be in the discretion of the Judge to whom the said application shall be made.

LIABILITY OF TRUSTEES.

32.—Every deed, will, or other document creating a trust, either expressly or by implication, shall, without prejudice to the clauses actually contained therein, be deemed to contain a clause in the words or to the effect following, that is to say:—"That the trustees "or trustee, for the time being, of the said "deed, will, or other instrument, shall be re-"spectively chargeable only for such moneys, "stocks, funds and securities as they shall "respectively actually receive, notwithstand-"ing their respectively signing any receipt for "the sake of conformity, and shall be answer-"able and accountable only for their own acts, "receipts, neglects, or defaults, and not for "those of each other, nor for any banker, "broker, or other person with whom any "trust moneys or securities may be deposited; "nor for the insufficiency or deficiency of any "stocks, funds, or securities; nor for any "other loss, unless the same shall happen "through their own wilful default respective-"ly; and also that it shall be lawful for the "trustees or trustee for the time being, of the "said deed, will, or other instrument, to reim-"burse themselves or himself, or pay or dis-"charge out of the trust premises all expenses "incurred in or about the execution of the "trusts or powers of the said deed, will or "other instrument."

33.—When any person shall, after the thirty-first of December, one thousand eight hundred and sixty-five, die seized of or entitled to any estate or interest in any land or other hereditaments, which shall at the time of his death be charged with the payment of any sum or sums of money by way of mortgage, and such person shall not, by his will or deed, or other document have signified any contrary or other intention, the heir or devisee to whom such land or hereditaments shall descend or be devised, shall not be entitled to have the mortgage debt discharged or satisfied out of the personal estate, or any other real estate of such person, but the land or hereditaments so charged shall, as between the different persons claiming through or under the deceased person, be primarily liable to the payment of all mortgage debts with which the same shall be charged, every part thereof, according to its value, bearing a proportionate part of the mortgage debts charged on the whole thereof; Provided always, that nothing herein contained shall affect or diminish any right of the mortgagee on such lands or hereditements to obtain full payment or satisfaction of his mortgage debts, either out of the personal estate of the person so dying as aforesaid or otherwise; Provided also, that nothing herein contained shall affect the rights of any person claiming under or by virtue of any will, deed, or document already made or to be made before the first day of January, one thousand eight hundred and sixty-six.

## SELECTIONS.

### THE IRISH BENCH.

The visitor going the round of "the Hall" first enters the Court of Chancery. There he beholds the Lord Chancellor, Maziere Brady, in his place, hale and vigorous, strongly built, and looking earnest and determined. He may be observed daily during Term walking home with his umbrella under his arm, evidently caring more about his health than his dignity. Yet it is forty-six years since he was called to the bar. He has filled his present office since 1856, having previously been Chief Baron of the Exchequer from 1840, so that it is twenty-five years since he was elevated to the bench.

Associated with the Chancellor in the Court of Appeal is the Lord Justice Blackburne, who was called to the bar in 1805, and has been consequently sixty years in the profession, of which period nineteen years have been spent on the bench. He was Chief Justice of the Court of Queen's Bench from Jan., 1846, to March, 1852, and was appointed Justice of Appeal—a new office—in 1856, having been Lord Chancellor, about nine months in 1852. He had also been Master of the Rolls from 1842 to 1846, when he was succeeded by the present Master, the Right Hon. T. B. C. Smith. This gentleman was called to the bar in 1819, forty-six years ago.

We next enter the Court of Queen's Bench. Justices O'Brien, Hayes, and J. D. Fitzgerald are all comparatively young. In their midst sits their chief, one of the most remarkable instances on record of judicial longevity. The Lord Chief Justice of the Queen's Bench is said to be now in his ninetieth year, but he has yet given no signs of his intention to retire. It is affirmed by his numerous friends and admirers that his perception is still quick and keen, and his judgment clear. This is admitted to be wonderfully true even by those who are not his friends; but they say, it is true, only for two or three hours after his coming into court in the morning, and that in the afternoon his intellectual powers visibly fail, and he does not seem so capable of grasping a subject or of following a chain of argument, and this is said to be a matter of frequent and anxious observation by barristers who practise in his court He was called to the bar in 1797, and has been incessantly engaged in his profession for the long period of sixty-eight years. He has occupied his present post since 1852, having previously been a puisne judge.

The next judge in the order of seniority is the Chief Baron Pigot, who was called in 1826, and has been on the bench since 1846. He has been thirty-nine years working at his profession, and he may be said to be the most painstaking of all the judges. The only fault with him is that he takes too much pains with minor matters, and too often wears out the patience of jurors and suitors, entailing upon the latter heavy extra expenses in the shape of "refreshers." Like all our judges, he is strictly upright and impartial, but it seems to be generally felt that his scrupulosity is excessive, almost morbid, and that it is sometimes a heinous inconvenience to the public. Associated with him are Barons Fitzgerald, Hughes, and Deasy, all able and efficient judges.

Chief Justice Monahan, is the youngest of the Chiefs. He was called to the bar in 1828, the year before Emancipation, and has been Chief Justice since 1850. He was Attorney-General during the State trials of 1848, when he distinguished himself by his zeal and ability in conducting the prosecutions of the political prisoners. No one has complained of any failure on his part. It is in his court the vacancy has been left by the retirement of Mr. Justice Ball. The other judges in it are Mr. Justice Keogh and Mr. Justice Christian, both highly esteemed by the public.

All these gentlemen acted prudently, and went on the bench when they had an opportunity. The name of Judge Keogh suggests another name—the most eminent of our equity lawyers—Mr. Brewster, who is still toiling at the bar, though he was Attorney-General under Lord Aberdeen's Government, Mr. Keogh being Solicitor-General. When that administration was broken up, and the Peel section retired from office, Mr. Brewster, who was one of the party, felt that he was bound in honour to retire with them. Mr. Keogh did not see matters exactly in the same light, and so he remained in office under the Whigs, and became a very young judge. It has been generally regretted that the exigencies of party, and the legitimate claims of others, have so long kept Mr. Brewster from receiving the just rewards of his pre-eminent professional merit. He was called to the bar so long ago as 1819, and for years his energies have been taxed to the utmost by the accumulating business that presses upon him.—*Law Times.*

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### MEDICAL EVIDENCE.

The assizes now drawing to a close have been unusually fertile in cases where medical evidence has been required, and in many there has been a failure, or partial failure of justice from the causes to which we are about to refer. We do not wish, however, to throw the slightest discredit by our observations on the medical profession. As a rule doctors are able and humane men, and discharge difficult and painful duties with singular discretion and often with much self-abnegation. Still they differ, of course, in mental power, and if a distinction is to be drawn between them, we should say that most of the really first-rate men among their ranks are to be found in the metropolis and one or two other great cities. The hard life and poor pay of the country practitioner are not attractive. The "blue ribbon" of the science of medicine is not

likely to be won in agricultural districts. Hence it often happens that a medical man in a county town has neither the brains nor the knowledge to be a competent scientific witness. Very frequently, especially in cases of murder and manslaughter, he is called on to speak to facts and circumstances quite as new to him as to the counsel who examine and cross-examine him. Such a state of things, we need hardly say, is prejudicial to the proper administration of justice.

Take, for example, a case of infanticide. The body of a new born child is found, and the nearest surgeon is immediately sent for to examine it. It matters not that he has never performed a similar duty before. He must do so now, and from whatever conclusion his inexperience will allow. Probably, if he is a sensible man, he will be able to make out a tolerably straightforward account of his *post mortem* examination, to be laid before the counsel for the prosecution. We will suppose, for the sake of an illustration, that he forms an opinion that the infant was born alive, and that it met its death by drowning. These two points he will insist on in his examination in chief, and so far all will go well. But it is almost impossible that he can come unscathed out of the crucible of cross-examination. The counsel for the prisoner will probable begin by asking "whether he has had much experience in these cases," and at the answer in the negative, the jury may be observed interchanging significant glances. Then Taylor's "Medical Jurisprudence," or some work of equal reputation will be produced, and long extracts read to the witness. After each extract he will be asked whether he agrees or disagrees with the writer. Of course he can only agree. He no more dare differ from Dr. Taylor on Dr. Taylor's own subject than a humble junior, upon a point of practice, from the Attorney-General or Mr. Lush. The extracts, if cautiously selected, will probably go to show that death *might* have happened from some other cause than drowning, such as accidental suffocation, or else that the child never had an independent existence. The unpractised surgeon, whose original opinion was very likely correct, is soon floundering hopelessly out of his depth in a sea of physiological difficulties. He cannot well retract his evidence in chief and he is afraid to question the worth of the suggestions put to him by his cross-examiner. The result is that he leaves the witness-box with the value of his testimony seriously injured, if not entirely destroyed.

We put it confidently to those of our readers who have had any experience in circuit courts, if we have at all exaggerated the scene which over and over again takes place. The fault lies in our present system of calling in doctors in criminal cases at hap hazard, and not in the ignorance of this or that particular doctor. A man may be a very fair physician, yet wholly incompetent to conduct the simplest *post mortem* examination. The only remedy is to be found in fresh legislation, and we trust that when the question of child-murder and other kindred crimes is brought before Parliament (as, after the horrid revelations the other day at Exeter, they surely must be), some method of getting reliable medical evidence may be devised. A plan has been suggested which we submit to the impartial consideration of our readers. It is that in every county in England there should be a sufficient staff of competent surgeons appointed to assist the coroner in his duties. Very few, or even one, in each county of ordinary size, would be sufficient. The telegraph could summon the "surgeon to the coroner," to the place where his presence was needed, with the loss of scarcely an hour, and the small delay would be well repaid by the trustworthy report such a man would be sure to give. It would be the fruit of years of labour instead of the hesitating result of a few hours "cram" at a text book, and would bear a searching investigation at the hands of the ablest counsel at the bar, without losing any of its value. Indeed, the practice of trying to pose the surgeon, which, in cases where his evidence is essential, is now the almost invariable resource of an experienced defender of prisoners, would soon die out, and from its extinction both the medical and legal professions, as well as the public, would reap a substantial benefit. Neither counsel nor witness cut a very dignified figure in the contests we have described.

Many objections, no doubt, can be fairly raised to the proposed scheme, which, we may observe, is already in operation on the other side of the Tweed. We do not intend, at present, to do more than present it to our readers. It is certain that the futility of medical evidence in criminal cases "has been increasing, is increasing, and ought to be diminished;" and our purpose in writing these remarks is to draw attention to that indisputable fact. The subject is one of great importance, and has not, as yet, received the attention which it deserves from law reformers and legislators.—*Solicitors' Journal.*

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## LIBERAL LAW PRACTICE.

The undersigned, after having vainly endeavored, for some years, to practice law for his own convenience and profit, has, in view of the expected brisk season next fall, concluded to pursue his profession for the convenience and profit of other people.

Experience has shown that in this city, especially among wealthy and influential citizens, many impediments have checked their litigious propensities. It is a fact, the notoriety of which is indisputable, that with all the vaunted ability and courtesy of our Bar, the most influential client has never been able to secure professional counsel or assistance for *nothing*. This certainly is an error in practice, which

saps the very foundations of public convenience.

Whether in the shape of the sugar-coated *retainer*, or the *vi et armis* fee, the evil scowls like a horrid spectre at every victim whom fraud forces into a lawyer's office. Poverty cannot beguile it, friendship cannot escape it, flattery cannot soften it, impudence cannot terrify it: there it stands, the inexorable tyrant of a liberal hearted community.

In the various transactions of every day business, all are aware that exigencies will arise, in which a few words of written or spoken legal advice, may, in preventing or correcting serious financial losses, be of incalculable service. Yet with full cognizance of such facts, what, in such exigencies, has been the practice of our Bar. Has it comported with the duty of a generous, dignified, and public-spirited profession? Has there ever been a time when the wealthiest merchant, the dearest friend, the most distant relation could solicit legal advice or service, even in the most urgent necessity, without a *fee*, the magnitude of which seemed only limited by the patience of the victim?

Nor is this all, clients must advance costs, must deposit *retainers*, and not unfrequently, enter security for the attorney's expected charges. Papers, of vast account to their owners, have more than once been withheld as hostages for fees, and commissions are actually deducted before the proceeds of collections are remitted.

To correct these heavy wrongs, to redeem, if possible, the selfish and ungenerous character of his profession, the subscriber, having every reason to believe that it will be acceptable to clients, proposes to establish, for the coming fall, a *gratuitous* system of legal practice.

In making this announcement, he hopes he may be permitted to say in all humility, that, to him, such a system is not *entirely* new. During his professional career, he has had abundant opportunity to see more or less, (especially more) of its practical workings. After such extended observation, he feels constrained to admit, somewhat against his private choice, it is true, that in this progressive age and city, he knows not the reform, which must more perfectly accord with the popular taste, or enlist a larger measure of the popular patronage, than the *gratuitous practice of the law.*

Far be it from the subscriber's aim, to blot a line from the epitaphs of the honored dead, or to wrest a laurel from the brows of the distinguished living members of the Philadelphia Bar. They have pursued, and pursue their professions with the sordid intuitions of a ruder era. Now, to the subscriber, humble though he may be, it may remain to elevate a loftier standard of professional ethics, to plant in the rich soil of legal intellect, a germ of professional philanthropy, which nurtured by genial public patronage, may bloom and fructify without money and without price, for the healing of the fortunes of clients not a few.

With approaching fall, the subscriber will secure at least two commodious and communicating offices, the locality of which will be in every way attractive and accessible to the business gentlemen of Philadelphia. No pains or expense will be spared to have said offices so lighted, heated, and ventilated, that they will at once be marts of business or halls of pleasure, as clients choose to regard them.

In the selection of furniture the subscriber will be greatly influenced by what he believes to be peculiar ideas of comfort on the part of most people, chairs will be especially adapted to tilting back, and in no case will a client be expected to use less than *two* at any single sitting, while the carpeting will be of rare pattern and texture, under no circumstances will the patrons of the offices be annoyed by the antiquated presence of mats and spittoons, when in connection with this, it is remembered that there will be no tyrannical restrictions as to the use of tobacco, the public must at once appreciate the rare facilities here offered for business enjoyment. All tables and book-cases will be of exquisite design, and admirably suited to clients who invariably select a graceful and luxurious posture. It is by no means unlikely that capacious lounges will be interspersed for the benefit of those who, having no particular business, often need a little rest in business hours from the natural *ennui* of the preceding night's entertainment. After adequate trial, if his business prove not *too* expensive, the subscriber may occasionally supply some of those creature comforts, which clients not unfrequently expect.

Notwithstanding these inducements, the subscriber desires it to be distinctly understood, that no avarice or greed of gain shall ever mar his business recreations. He takes pleasure in advising his prospective patrons (if any such he may expect), that all the ancient dodges for getting gratuitous advice or service, will, under this new and liberal regime, be totally unnecessary. *In no case will a fee be received.* Advice, at all times and upon all matters, will be freely given, and trivial matters brought to his extended notice at meal-times will receive special attention. He will invariably advance *costs*, and in some cases, allow six per cent. on the same, to regular clients.

Parties desiring advice will never be limited in their explanations to the matter under consideration, but any digression, whether as to family history or personal misfortune, "no matter of how long standing," or how irrelevant, will not only be listened to and excused, but will be absolutely encouraged (this feature must command the attention of old ladies).

Whenever parties entertain a remote idea of prosecuting a claim, they will be patiently advised, and in event of their subsequently abandoning the case, a liberal commission will be paid for their intention.

A full supply of legal forms, adapted to every conceivable variety of mercantile transaction, will be constantly kept on hand for the free accommodation of applicants.

Every facility will be afforded clients to inspect and disarrange the subscriber's papers, and to overhear and repeat his most confidential communications. He would also say that, for the benefit of the public at large, he has been for some time sedulously memorizing "*McElroy's Philadelphia City Directory*," with a view of being able at all times to answer all questions to everybody and about everybody.

The subscriber hopes, perhaps vainly, that this novel system of law practice will certainly conduce to one thing, the perfect satisfaction of clients with attorneys. He believes that thereby much of the bitterness heretofore existing against his honoured profession will be assuaged, and though he is not entirely assured that said system will to himself be either pleasurable or profitable, he is not without an abiding faith that it will be no less satisfactory to his clients (at least on his account). "DO IT CHEAP,"

Att'y and Coun'r at Law. Philadelphia.

—*Legal Intelligencer.*

## UPPER CANADA REPORTS.

### QUEEN'S BENCH.

(*Reported by* C. ROBINSON, Esq., Q.C., *Reporter to the Court.*)

### CRAIG v. THE GREAT WESTERN RAILWAY CO.

*R. W. ticket "good for twenty days"—Right to stop at intermediate stations.*

The plaintiff purchased from defendants a ticket from Buffalo to Detroit, marked "good only for twenty days from date." He took defendants' afternoon accommodation train at the Suspension Bridge, which ran only as far as London, but he left it at St. Catharines, an intermediate station, and defendants refused to let him go on from thence by the night express.

*Held*, that they were justified in so doing: that defendants' contract bound them to convey the plaintiff in one continuous journey from the Suspension Bridge to Detroit, giving him the option of taking any passenger train from the point of commencement, and if that train did not go the whole distance, to be conveyed the residue in some other train,—the whole journey to be completed within twenty days: but that it did not give a right to stop at any or every intermediate station.

*Quære*, whether if he had gone on to London by the accommodation train, he would have been bound to take the next through train from thence.

[Q. B., T. T., 1865.]

Appeal from the County Court of Brant.

Declaration, that the defendants were and are common carriers of passengers from the City of Buffalo, in the State of New York, one of the United States of America, to the City of Detroit, in the State of Michigan, one of the said United States, through the Province of Canada; and as such carriers the defendants, for reward to them in that behalf paid by the plaintiff, received and took the plaintiff at Buffalo aforesaid as a passenger, to be by the defendants carried on certain railway trains and cars from Buffalo aforesaid to Detroit aforesaid; and although the defendants did carry the plaintiff a part of the distance from Buffalo aforesaid to Detroit aforesaid, to wit to the St. Catharines station on their railway, yet the defendants refused to carry the plaintiff the rest of the distance from St. Catharines aforesaid to Detroit aforesaid, or any part thereof; and violently and with force and arms, and without any lawful cause for so doing, prevented the plaintiff at St. Catharines aforesaid from further riding on their said cars, and from getting on or remaining on said cars, or further proceeding on their said cars to or towards Detroit aforesaid,—by means whereof the plaintiff was forced to return to the said City of Buffalo, and by means of other modes of transportation procure and pay again for his passage, and lost much time, and was put to great expense and inconvenience.

*Pleas* 1. Not guilty, by statute, 16 Vic. ch. 99, secs. 10 and 12, Public Act.

2. That the plaintiff was not received by the defendants as a passenger, to be carried by them for reward, as in the declaration alleged.

At the trial in the court below it appeared that the plaintiff purchased from the agent of the defendants in Buffalo, in the State of New York, a ticket as follows:

"New York Central Railroad Co.
Buffalo to Detroit.

Good for one first class passage only, upon presentation of this ticket with checks attached, and good only for twenty days from date. Not good unless dated and endorsed by the receiver."

"Via N. Y. C. and Gt. W. Railroads.

Conductors are required to detach from this ticket and take up the checks over their respective lines. The conductor upon the road at the end of the route will take up the ticket as well as the check over his road. If the checks belonging to this ticket are detached, it will not be received for passage."

(Signed) EDWARD F. FOLGER,
*Chief Clerk.*

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|---|---|---|
| 1462. | "1462. Issued by N. Y. Central R. R. Co.<br>Great Western Railway.<br>Suspension Bridge to Detroit.<br>First Class.<br>4 This check is forfeited if detached." 1 | Detroit. |

It was surmised, and the fact most probably was, that there had been another check or coupon attached to this ticket, authorizing the holder to pass from Buffalo to the Suspension Bridge by the N. Y. Central Railroad. It was not shewn when the ticket was sold, and it might have been sold within twenty days before the committing of the grievance complained of; on the other hand, it might have been sold in May, 1864. It was not dated and indorsed, so far as the evidence shewed. The agent swore that he was sure this ticket, numbered 1462, was not sold by him in July or August, 1864.

It was proved that about the 24th of August, 1864, the plaintiff came to St Catharines by the afternoon accommodation train of the defendants. This train was due at St. Catharines at 4.05 p.m., and it ran only as far as London. St. Catharines is the second station from the Suspension Bridge. The plaintiff left the train there and went into the town. It was stated that a passenger for

Detroit by the accommodation train would be delayed six or seven hours at London, and must take the night express to go to Detroit. He would arrive at Detroit at the same time as if he had waited at the Suspension Bridge and entered the night express there. The plaintiff went that night back to the station at St. Catharines, apparently in order to go on to Detroit by the next train. On his arrival at St. Catharines he shewed his ticket (like the one set out) to the defendants' agent at St. Catharines, and asked if that ticket was good by that train; the agent said, No. It appeared also, that the plaintiff was told by the defendants' ticket examiners at St. Catharines that he could not enter the night express train on that ticket at St. Catharines, as it was a local station, and the agent said that if after that notice the plaintiff had offered to get upon that train he would have been forcibly prevented. Evidence was given that it was cheaper to take a ticket like the one produced, for a passage from Buffalo to Detroit, than to take a ticket first to the Suspension Bridge, next from thence to St. Catharines, and lastly from St. Catharines to Detroit. The plaintiff, being thus prevented from going to Detroit, returned to Buffalo.

This was the plaintiff's case, to which it was objected, *first*, that there was no proof that the plaintiff was ejected from the cars or forcibly prevented from riding thereon; *second*, that the ticket was marked good for only twenty days, and the evidence shewed that it was bought in May; *third*, that the ticket did not authorize any stoppage over at St. Catharines.

It was agreed the case should go to the jury, and if they found for the plaintiff that the defendants might move in term to enter a nonsuit.

The defendants then gave evidence, from which it appeared that the plaintiff came in an accommodation train of the defendants from the Suspension Bridge on the ticket produced; that the conductor of this accommodation train recognized the right of the plaintiff to travel by that train, and punched the ticket; that the plaintiff might have gone on by that train to London, beyond which station it did not go, and that he might have taken the night express train, that night at London, and have gone on to Detroit. The defendants' witnesses put it beyond doubt that the plaintiff, having left the accommodation train at St. Catharines, was told by the company's officers that he would not be allowed to enter the night express train that evening for Detroit on the ticket which he had, and consequently he did not attempt it.

The jury were asked, first, whether the defendants, after undertaking to carry the plaintiff from Buffalo to Detroit, refused to allow him to travel on their train from St. Catharines for the rest of the journey; secondly, whether the plaintiff was so prevented from travelling within the time that they contracted to carry him.

They found for the plaintiff, and a rule *nisi* afterwards granted to enter a nonsuit on the leave reserved was discharged. The defendants appealed from this decision.

*M. C. Cameron*, Q. C., for the appellants.

*E. B. Wood*, contra.

Draper, C. J., delivered the judgment of the court.

We agree in the view of the learned judge, that the evidence substantially supports the allegation, that the plaintiff was prevented from continuing his journey by the refusal of defendants to allow him so to do.

The question in dispute seems to me reduced to this—whether the defendants were justified in their refusal. What did the plaintiff require? What did the defendants refuse.

The plaintiff's contention, pushed to its full extent, involves the assertion of a right to stay over at any and every station between the Suspension Bridge and Detroit, at which the train in which he was travelling should stop, provided he was travelling within twenty days from the date when he received his ticket. On the other hand, the defendants' contention would limit the plaintiff to one continuous journey within the twenty days, not allowing him to stay over at any station.

The plaintiff had an unquestionable right, if he had remained at the Suspension Bridge till the night express train started, to have been carried in that train to Detroit, and this the defendants admit; and they admit further, as the evidence shews, that he had a right to commence his journey from the Suspension Bridge in an accommodation train running towards but not so far as Detroit. and to complete it by another train to that city.

If the plaintiff is right, it can make no difference in what train of the defendants he began his journey, whether a train going the whole distance or a part only. In either case he can stop at any intermediate station he pleases, and remain over as long as he chooses, within the limit of twenty days.

This right of stopping is not in terms contained in the contract, for there is not a word in it referring to intermediate stations from which such right can be inferred. It rests solely on the statement that the ticket is good for twenty days from date. The argument is, that the extension of time is given for the purpose of affording the holder of the ticket the privilege of stopping at intermediate stations, because the continuous journey would occupy less than twenty-four hours.

But if this were intended, the simpler and more obvious course would have been to have expressed the permission or condition as relating to *place* rather than to *time*, whereas time only is mentioned.

It is further apparent that the railway fares from station to station between the Suspension Bridge and Detroit amount to a larger sum than the single fare for the whole distance on a through ticket.

It may no doubt be the policy of the defendants to attract through travel, and there may be competition with other companies inducing them to place their fares for through journeys at lower rates than the aggregate of the fares from station to station would amount to. But these considerations are adverse to an inference that an extension of time, within which the traveller would have a right to make the through journey, was given to enable him to stop at every intermediate station.

The practice which the defendants have sanctioned is not consistent with a strict application

of the principle for which they contend, for to be rigidly consistent they should not admit a through passenger into a train which will not convey him to the end of his journey. They do however allow such a passenger to travel in a mode which makes a break in point of time in the journey—that is, to commence in a train going only part of the way, and which will reach its destination some hours before the through train will arrive by which he can complete his journey; and they might find difficulty in maintaining that such traveller was bound to go on by the first through train, provided the twenty days were still current. That question however does not arise here, and it does not, in our opinion, follow that because they are willing he may use an accommodation train as far as it will convey him on his journey, and may complete that journey by another train, he may stop at as many intermediate stations as suits his convenience, with no other restraint than that of completing his route within the twenty days.

No authorities have been referred to, and we have not seen any which govern this question. Our conclusion is, that the defendants' contract bound them to convey the plaintiff in one continuous journey from the Suspension Bridge to Detroit, giving him the option of taking any passenger train of the defendants from the point of commencement, and entitling him, if the train in which he started did not go the whole distance mentioned in his ticket, to be conveyed the residue of that distance in some other train of the defendants—the whole journey to be completed within twenty days from the date of the ticket; and that the contract did not confer on the plaintiff a right to stop at every or any intermediate station, though within the limited twenty days. As a consequence, the defendants were not guilty of a breach of duty arising from their contract, by refusing to carry the plaintiff from St. Catharines to Detroit under the circumstances shewn in evidence.

We think therefore the appeal should be allowed, and that judgment of nonsuit should be entered against the plaintiff in the court below.

Appeal allowed.

## COMMON PLEAS.

*Reported by* S. J. Vankoughnet, Esq., M.A., *Barrister-at-Law, Reporter to the Court.*)

### Stephens v. Berry.

*Unstamped bill of exchange—Time for affixing double stamp—Evidence—Bill payable in American currency—Damages—Account Stated*—White v. Baker, 15 U.C.C.P. 292, *followed.*

When a party becomes the holder of an unstamped bill of exchange he must, in order to make it valid in his hands, affix the double stamp to it *before* commencing an action upon it.

Per Richards, C.J., that the holder of such a bill can only be considered safe by affixing the proper stamp at the time when in law he would be considered as having taken and accepted the bill as his own, or within a reasonable time thereafter.

The view expressed in *Baxter* v. *Baynes*, 15 U.C.C.P. 237, as to the most convenient mode of raising the question of the invalidity of a bill for want of a stamp, (*i. e.* by a special plea) adhered to. In this case, however, as no objection had been taken at the trial to the absence of a special plea, and express leave had been given to enter a nonsuit, if the court should be of opinion that plaintiff was not entitled to recover on account of the bill not having been properly stamped in due time, and the case having been argued on that ground, the court did not consider it necessary to discuss the question as to the propriety of such ground of defence being set up under the plea of non-acceptance.

*Held*, also, that the bill of exchange was no evidence of an account stated between the plaintiff and defendant (indorsee and acceptor) as there was no privity between them; nor were certain letters which referred only to the bill, for if the latter was void, an acknowledgment of it and promise to pay in a particular way could raise no promise to pay on the account stated, because there would in any event be no legal or valid consideration for the promise.

*White* v. *Baker*, 15 U.C.C.P. 292, followed as to the damages in the shape of exchange, to which the holder of a bill is entitled against the acceptor.

*Quære*, whether an instrument, purporting to be a bill of exchange, payable in New York "with current funds," if it mean other than lawful money of the United States, is a bill of exchange.

[C. P., T. T., 1865.]

The first count of the declaration alleged that one William Young, on 11th January, 1865, by his bill of exchange, then overdue, directed to the defendant under the name and firm of E. Berry & Co., required the defendant to pay to his order the sum of fifteen thousand dollars in New York, with current funds, sixty days after date thereof; and defendant, under the name and style of E. Berry & Co., accepted the bill payable at the Bank of America, in New York, and the said William Young then endorsed and delivered the said bill to the Metropolitan Bank, or order, for account of the said plaintiff; and the said Metropolitan Bank then endorsed the same to the plaintiff; and the said bill was duly presented for payment thereof at the said Bank of America, in New York, and was dishonoured.

The declaration also contained the common counts for money payable by the defendant to the plaintiff for goods bargained and sold by plaintiff to defendant; for goods sold and delivered; work, labour, and materials; for money paid, money received by defendant to the use of plaintiff, for interest, and for money due on an account stated.

The defendant pleaded on 18th April, 1865,

1. That he did not accept the bill.
2. Plea to second count, never indebted.

On these pleas issued was joined.

The cause was taken down to trial at the last spring assizes for the county of Victoria, before Mr. Justice Adam Wilson.

The bill sued on was given in evidence. It was dated at Milwaukee, 11th January, 1856, drawn by William Young on Messrs. E. Berry & Co., Kingston, C.W., payable to the order of the drawer, sixty days after date, for fifteen thousand dollars, in New York, with current funds. It was endorsed by the drawer, "Pay Metropolitan Bank, or order, for account of R. H. Stephens, Esq., or order," and by Romeo H. Stephens. On the face of the bill, it was accepted payable at Bank of America, New York, by E. Berry.

A letter from E. Berry & Co. to the plaintiff, dated 24th March, 1865, was also put in, stating they would substitute their draft on Jacques Tracy & Co., at three months date, to mature $\frac{1}{3}$, $\frac{1}{16}$ June and $\frac{1}{3}$ July, for $15,000 and interest on the whole, to be in place of Young's draft on them, held by the plaintiff. The notes were to carry interest at 7 per cent. from 15th March, to be made in three equal amounts. Mr. Young's note was to be returned to him on the above notes being handed over to plaintiff. There was also another letter from E. Berry & Co. to plaintiff, dated, Kingston, 28th March, 1865, in which

they acknowledged the receipt of plaintiff's letter of the 25th March, and said they had written Mr. Jacques that their proposal of the 24th March had not been accepted, and that they should not have occasion to trouble them. The letter proceeded, "We think we can make you a substantial payment as soon as navigation opens in May, and the remainder early in June, if that will suit you. We have at the moment no one whom we should like to ask to endorse for us; we never endorse ourselves for any one." The plaintiff contended that these letters were evidence of an account stated between the parties, of a debt of $15,000.

For defendant it was contended that the bill was drawn at Milwaukee, in the United States, upon defendant at Kingston, in Canada, payable in the city of New York; that at the time of the acceptance there were no stamps on the bill under our Prov. Stat. of 1864, and no stamps were placed on it until after the commencement of this action; that after the commencement of this suit, Canadian stamps to the amount of $9, being double the amount required at the time of the acceptance, were placed on the bill when the plaintiff put his name on it as endorser, and *Sproule* v. *Legge*, 1 B. & C. 161, was referred to.

It was also urged that the money in the declaration must be presumed to be Canadian currency; but it was not so in fact, because when the bill was produced, it was shown to be currency of the United States.

It was admitted that at the time the bill became due, on the 15th of March, 1865, if payable in current funds of the United States [as distinct from a gold value] the Canadian value of the bill was $8,510 64; while if current funds were valued, as of the 6th of May, 1865, the day of the trial, the value of the bill in Canada funds would be $10,628 88. The three following modes of stating the value and damages, if plaintiff was entitled to recover, were made up:

| | |
|---|---|
| 1. Considering the value..... | $15,000 00 |
| Interest, $160; Protest, $1 10... | 161 10 |
| | $15,161 10 |
| 2. Value of American funds as Canada funds, on 15th of March, 1865... | $8,510 64 |
| Interest, $90 72; Protest, $1 10. | 91 82 |
| | $8,602 82 |
| 3. Value in American funds as Canada funds, on the 6th of May, the day of trial ..... | $10,628 88 |
| Interest, $113 36; Protest, $1 10. | 114 46 |
| | $10,743 34 |

For the defendant it was contended that there was no evidence of an account stated.

It was agreed that a verdict should be entered for the plaintiff for $8,602 46, with leave to move to increase it, on either or both of the counts of the declaration, to either of the other two sums above noted, if the court should think him entitled to a larger sum than that for which the verdict had been entered.

Leave was also given to the defendant to move to enter a nonsuit, if the court should be of opinion that the plaintiff was not entitled to recover, because the bill was not stamped with Canadian stamps in due time to enable him to do so.

Defendant also had leave to move to enter a verdict for him on the account stated, and on the common counts, if the plaintiff retained his verdict on the first count. It was also admitted that the firm of Jacques, Tracey & Co., mentioned in the letters, resided and did business in Montreal.

In Easter Term last the defendant obtained a rule *nisi* to enter a nonsuit, pursuant to leave reserved, on the ground that the bill of exchange offered in evidence, and the acceptance thereof, were invalid and of no effect for want of the necessary revenue stamps being affixed thereto; or because such stamps were not affixed at such time, or by such person or persons, as would give validity to such bill or acceptance, or entitle the plaintiff to maintain his suit.

Or why, pursuant to such leave, a verdict should not be entered for the defendant upon the second issue joined, there having been no evidence to warrant a verdict for the plaintiff thereon. Or, why the verdict should not be set aside and a new trial had, because the same was contrary to the evidence, the declaration being upon a bill of exchange payable in lawful money of Canada, and the evidence being of a bill payable in money of a foreign country.

During the same Term the plaintiff also obtained a rule *nisi* to increase the verdict, pursuant to leave reserved, 1st to the sum of $15,161 10, on the ground that the plaintiff was entitled to the full amount, in lawful money of Canada, of the face of the bill in the declaration mentioned, being $15,000 with interest, or the equivalent, in lawful money of Canada, of the sum of $15,000 in American money, having regard to the relative value of the Canadian and American dollar respectively; or, 2nd, to the sum of $10,743 34, on the ground that the plaintiff was entitled to a verdict for an amount which would, on the day of the trial, have purchased a draft on New York for $15,000 and interest and such sum of $10,743 34, being e requisite sum for such purpose.

Both these rules were enlarged until the present Term, and came on to be argued together.

*Anderson* for the plaintiff.

The bill was drawn and is payable in the United States, though accepted in this Province.

The 9th section of the Stamp Act provides, that any person in the Province who makes, draws, accepts, indorses, signs, or becomes a party to any bill or note chargeable with duty, before the duty or double duty has been paid by affixing the proper stamp, such person shall incur a penalty of $100, and the instrument shall be invalid and of no effect in law or equity, and the acceptance shall be of no effect, except only in case of the payment of double duty; but that any subsequent party to such instrument may, *at the time of his becoming a party thereto*, pay such double duty by affixing to such instrument a stamp to the amount thereof, and by writing his signature or initials on such stamp, and the instrument shall thereby become valid. Here the plaintiff has affixed the double stamp to the bill, and the only question is, has he done

so in the proper time? That depends on the time when he became a party to the bill. This he did when he endorsed it. The holder of a bill is not necessarily a party to it, and until he puts his name on it, or in some way signifies that he is a party to the bill, he ought not to be brought within the highly penal terms of the statute.

There is a letter admitting defendant's liability, and the verdict is on the common counts as well, and may stand for the plaintiff on these counts.

The face of the bill with interest is the proper measure of damages. It is payable in dollars, and we know of no difference between the American dollar and our own; it is very trifling if there be any difference; and, therefore, the amount of the bill in our own country is what it really represents. We cannot take notice of the fact, that in the United States something else than gold is receivable in payment of debts, which in fact reduces the standard of their currency, though the coinage is precisely the same as it was before. The action is against the acceptor, and the case of *Suse* v. *Pompe*, 8 C. B. N. S. 538, is only authority to shew that, as against the drawer or endorser of a bill, the damages are limited to exchange and expenses: Chitty on Bills, 412; *Dawson* v. *Morgan*, 9 B. & C. 618. But in an action by indorsee against acceptor, the liability is to pay the money mentioned in the bill with legal interest, according to the rate of the country where it is due.

As to the variance in not describing the bill as payable in lawful money of the United States, he applied to amend if necessary.

*McLennan*, contra.—The venue is laid in the County of Victoria in this Province, and the bill according to the declaration, will be considered as made there, and the money mentioned in it will be considered as lawful money of Canada. *Kearney* v. *King*, 2 B. & Ald. 301, was an action against the defendant as acceptor of a bill of exchange. The declaration stated that a bill of exchange was drawn and accepted at Dublin, to wit, at Westminster, for certain sums therein mentioned, without alleging it to be Dublin in Ireland; and it was held, that, on this declaration, the bill must be taken to have been drawn in England for English money, and, therefore, proof of a bill drawn at Dublin in Ireland for the same sum in Irish money, which differs in value from English money, did not support the declaration, and was a fatal variance. In *Sproule* v. *Legge*, 1 B. & C. 16, the declaration stated the plaintiff, at Dublin, made a promissory note, and promised to pay the same at Dublin, without alleging it to be Dublin in Ireland, where also it was held that the promissory note must be taken to have been drawn in England for English money, and proof of a note made in Ireland for the same sum in Irish money did not support the declaration. Reference is also directed to Chitty on Bills, 397.

The stamps not having been put on the bill until after the commencement of the action, plaintiff must fail; the plaintiff's rights have reference to the time of bringing the action, and if the bill was not a good bill then, it cannot be now. If the plaintiff was not a party to the bill, he could not bring an action on it; and if, having brought his action, he then became a party to the bill, he did not even then stamp it, and it is therefore void. According to defendant's argument, the holder of a bill, who has never endorsed it away, can always avoid the forfeiture by putting on the double stamp and writing his name on it, even at the trial. This would in fact render the act of Parliament of little use; for frauds would constantly be practiced to avoid it. *Baxter* v. *Baynes*, 15 U. C. C. P. 245, is referred to as to the effect of the stamp act.

As to the account stated, the contract arising from the account stated is a contract to pay on request or demand, whilst the agreement to pay by defendant's letters is in a particular way.

No contract arises on the account stated from plaintiff being the holder of the bill, as there is no privity between him and the acceptor; *Early* v. *Bowman*, 1 B. & Ad. 889. *Calvert* v. *Baker*, 4 M. & W. 417; *Burmester et al.* v. *Hogarth*, 11 M. & W. 97; *White* v. *Baker*, 15 U. C. C. P. 292; Story on Conflict of Laws, secs. 286, 309; *Wood* v. *Young*, 14 U. C. C. P. 250; Chitty on Bills, 9 ed. 582, 583, 685, 686.

If the plaintiff can sustain the action, all he is entitled to recover is the value of the American money the day the contract was to be performed, with interest. He referred also to *Suse* v. *Pompe*.

Richards, C. J., delivered the judgment of the court.

The first question to be considered is whether the plaintiff is a party to the bill sued on, and when he became such party. As a general rule, no person can sue on a bill of exchange or promissory note unless he is a party to it. The expressions run constantly through the cases, "He cannot sue on the bill; he is no party to it."

In Chitty on Bills, 9 ed. p. 27, it is stated, "The drawer, acceptor, endorser, and *holder*, are the principal and intermediate parties to the instrument." In the declaration the plaintiff avers that Young endorsed and delivered the bill to the Metropolitan Bank, who endorsed the same to plaintiff. Now all this must have been done before the plaintiff could sue on the bill. It is true some of the authorities shew that if the bill, when the action was commenced, was in in the hands of a third person, as agent or trustee for the plaintiff, he might sue, though the bill was not then in his actual possession. In all these cases, I apprehend, the person suing has been a party to the bill at some time before the bringing of the action. For the purposes of our stamp act, I think we are certainly bound to decide, that when a person becomes the holder of an unstamped bill, so as to sue and does sue on it, he must, to make it valid in his hands, have put the double stamp on it before commencing the action. Indeed I personally take a much stronger view of the necessity of a holder protecting himself by the double stamp, when the bill without it would be void. The holder, in my judgment, can only be considered safe when he puts on the proper stamp at the time he would in law be considered as having taken and accepted the bill as his own, or within a reasonable time thereafter. We are, therefore, of opinion that, on the first ground of nonsuit, our judgment must be in favour of the defendant.

In coming to this conclusion, I may observe that I still retain the view expressed in *Baxter* v.

*Baynes*, that the most convenient way to raise the question as to the invalidity of a bill for want of a stamp is by a special plea; but as no objection was taken at the trial to the want of a special plea, and express leave was given to enter a nonsuit, if the court should be of opinion that the plaintiff was not entitled to recover for want of the bill being properly stamped in due time, and the case was argued before us on that ground, we do not think it necessary in this case further to discuss the question as to this ground of defence being set up under the plea, that the defendant did not accept the bill.

The bill is not evidence of an account stated as between these parties, for there is no privity between the acceptor and the endorsee. The only evidence is the letters produced at the trial, and these only refer to the bill which is the subject of the action. If that bill is void and of no effect, an acknowledgment of it, and a promise to pay in a particular way, can raise no promise to pay on the account stated, for there would in any event be no legal or valid consideration for the promise stated. The doctrine is laid down in some of the older cases, though not expressly in relation to the particular point now under discussion, "the accompt doth not alter the nature of the debt, but only reduceth it to certainty;" *Drue* v. *Thorn* Aleyn. 78.

As to the question of damages, *Suse* v. *Pompe* is an authority that the amount for which the jury assessed damages, is the amount which could be recovered against the drawer or endorser of the bill; and some of the authorities seem to sanction the view, that larger damages may be recovered by the holder against drawer and endorser, than against the acceptor; the acceptor not being considered liable for re-exchange, as his contract is only to pay the sum specified in the bill and legal interest, according to the rate of the country where it is due. The amount found for the plaintiff accords with the views expressed in *White* v. *Baker*, decided in this court, and is quite as favourable to the plaintiff as the authorities would seem to warrant.

In argument it was suggested, that the value of the American currency, as compared with our own, at the time of the trial, was the true measure of damages for the plaintiff, or that the plaintiff might select any day between the breach of defendant's contract to pay and the assessing of the damages, as the one on which the rate of exchange should be fixed. Independent of the invariable doctrine in England, that interest is the only damages that can be given for the detaining of money after the day on which it is due, the authorities, particularly in England, in the case of an ordinary breach of contract, when the party suing has paid all the money, decide that the damages are to be considered by placing the plaintiff in the position he would have been in, if the defendant had carried out his contract; and the value of the commodity to be delivered is to be estimated at what it was worth at that time. There seems to be one exception to this rule; when stocks are borrowed to be returned by a certain day, the jury should give such damages as will indemnify the plaintiff, and, when the stock has risen since the time appointed for the transfer, it will be taken at its price on or before the day of trial; (*Owen* v. *Routh*, 14 C. B. 327, and American notes to that case.)

There was nothing said in the argument as to this bill being payable in New York with current funds. If that means any thing different from lawful money of the United States, then it may be a question if the instrument is a bill of exchange at all; and if it is not legally a bill of exchange, plaintiff can have no property in it.

The rule to increase the damages will be discharged, and the defendant's rule to enter a nonsuit made absolute.

Rule absolute to enter a nonsuit, rule to increase damages discharged.

## PRACTICE COURT.

(*Reported by* Robt. A. Harrison, Esq., *Barrister-at-Law.*)

### Lister v. Ham.

*Arbitration and award—Power of referee to examine parties in their own behalf—Discretion to reject such evidence.*

Where an order of reference made by consent of parties provided that the arbitrator "shall have power to examine the parties and their witnesses upon oath or affirmation" it was held that the arbitrator had no discretion to reject the evidence of one of the parties, who tendered himself as a witness on his own behalf.

[Easter Term, 1865.]

The defendant during Easter term obtained a rule calling on the plaintiff to shew cause why the award made herein should not be set aside on the following grounds:

1. That the arbitrator refused to examine the defendant on oath though requested by him so to do and refused to receive the evidence of the defendant at the reference though tendered by him.

2. That the arbitrator exceeded his authority in ordering the defendant to pay the costs of the action.

3. That the award was made after the authority of the arbitrator to make an award had expired.

*Sir H. Smith*, Q. C., shewed cause.—An enlargement of the time for making the award was duly made and both parties attended at the reference after and upon such enlargement, and no objection can now be taken as to the mere alleged irregularity of it.

The costs awarded are the costs of the suit, but the arbitrator has only expressed how they should be paid as the submission itself had declared he has directed them to be paid to the plaintiff and as the event of the award is in his favour it is just what the submission says, that they shall abide the event of the award. His finding as to the costs was wholly unnecessary and inoperative and does not in the least affect the award; and as to the rejection by the arbitrator of the defendant as a witness the arbitrator had a discretion so to act, and it is not contended by the defendant that his evidence was material or that it was corruptly rejected.

*J. V. Ham*, defendant in person, supported his rule.—The defendant was entitled to have his evidence taken and the arbitrator had no discretion to receive or reject it as he pleased. The evidence was not to be taken only if the arbitrator

saw fit. It was to be taken by the arbitrator if the defendant desired it and tendered it. And there has been a miscarriage of justice by the rejection of evidence, and more particularly in this case, where so much of the matters in dispute rest only in the knowledge of the defendant. It was that his evidence might be taken, that the reference was directed, and the whole purpose of the arbitration will be defeated if such evidence is to be excluded: *Keene* v. *Deeble*, 3 B. & C. 491; *Warne* v. *Bryant*, 8 B. & C. 590; *Morgan* v. *Morgan*, 1 Dowl. 611; *Smith* v. *Sparrow*, 4 D. & L 604; S. C., 11 Jur. 126; Russell on Arbitration, 1 Ed. 176, 182-3.

ADAM WILSON, J., I will consider this case only on the special grounds taken for the rejection of the defendant as a witness.

The reference was by and under an order of Mr. Justice Morrison, dated the 4th of June, 1864. The order provides, "and I further order that the parties shall produce to the said arbitrator all such books, deeds, papers and writings, in their or either of their custody or power as the said arbitrator shall require, who shall have power to examine the parties and their witnesses upon oath or affirmation."

The amount awarded against the defendant is $807 90, which sum, and also the costs of the cause and of the reference, the defendant is directed to pay.

In *Lloyd* v. *Archbowle*, 2 Taunt. 328, Mansfield, C. J., held it was no objection that the arbitrators had examined a witness who was so interested that he ought to have been a plaintiff "because they had by the terms of the reference power to examine the parties themselves," and he added "in many cases justice cannot be obtained without it."

In *Smith* v. *Sparrow*, 4 D. & L. 604, the decision was that an arbitrator could not without express authority conferred by the submission examine one of the parties against the consent of the other party.

In *Wells* v. *Benskin*, 9 M. & W. 45, the submission provided that the parties respectively were to be examined on oath, to be sworn, if thought necessary, by the arbitrator. The arbitrator examined each party in support of his own case and it was argued that the one party could be called only for the other and not be produced by himself on his own behalf. The court said the arbitrator had the discretion to examine the parties when and to which of the matters he thought fit and they refused to overrule his decision.

In *Scales* v. *The East London Water Works*, Hodges 91, the arbitrator had the discretion to examine either of the parties and "he might not," as the court said, "have thought it quite right to examine the plaintiff."

In *Keene* v. *Deeble ubi supra*, the arbitrator had power to examine the parties. Littledale, J., said, "in relation to this power a different mode of proceeding was allowed and different *media* of proof were rendered admissible by such an agreement. At the trial the defendant's evidence could not have been received—before the arbitrator it was admissible,"

In *Warne* v. *Bryant*, *ubi supra*, the arbitrator was at liberty to examine the parties if he should think fit. He examined the plaintiff on behalf of his own claim. The court held the arbitrator might examine the parties for any purpose and in any stage of the enquiry. He is to exercise his discretion in all cases whether he will allow a party to be examined at all. In practice many cases are referred for the express purpose of having the parties examined and the arbitrator may under this order examine a party to the suit even in support of his own case.

In *Morgan* v. *Williams*, 2 Dowl. P. C. 128, the arbitrator had power to examine the parties, and it was held that the arbitrator did right in not examining the plaintiff to prove his own case.

In this last case the court considered that the arbitrator having power to examine the parties only enabled the one party to call the other as a witness; and in *Wells* v. *Benskin* this was said to have been the course and practice which had been pursued under references of this nature as well as when the arbitrator had the liberty to examine the parties if he should think fit. But the court in the latter case approving of the practice laid down in *Warne* v. *Bryant* determined that where the parties might be examined by the terms of the reference the arbitrator might examine each party in support of his own case.

It is singular there should have been no decision that I can find which settles whether or not the party has the right, even against the will of the arbitrator to tender himself as a witness and to be examined in support of his own case, and, since the late change in the law of evidence in England, permitting parties to be witnesses on their own behalf, no such question can have arisen, so that I am left to deal with this point by the light of such authorities as I have referred to.

The question is not whether the parties may or may not be witnesses even for themselves, for, from the authorities mentioned, it is clear that they may be, under the terms of its submission, if the arbitrator permit them to be called. But the question is this, can the arbitrator determine absolutely whether the parties may or may not be witnesses or whether the parties themselves have not the right and power and the exclusive right and power of producing themselves as witnesses when and how they please.

By this submission it is provided that the arbitrator "shall have power to examine the parties and their witnesses upon oath or affirmation."

Now it appears to me that the meaning and object of this provision were and are that the parties and their witnesses should be examined and that the arbitrator should have power to administer to them the oath or affirmation and that it never was intended that the arbitrator should determine who should and who should not be examined as witnesses. If he could reject one of the parties he might equally reject some of his witnesses. This condition is not against any positive provision of the law although it is true the practice of the law excluded the parties to this cause as witnesses. But it excluded also many others upon no better ground, whom it now permits to be sufficient witnesses and although our law in this respect is far behind the liberality and wisdom of the English enactments, I am not disposed to cramp

this agreement of the parties, for the mere purpose of giving effect to a rule of exclusion which is not at all creditable to our legislation.

As the parties therefore have agreed that their interest shall be no hindrance to their examination, and as they have agreed that they may be examined, I think the discretion as to the exercise of this power should, as in reason it ought to rest with the parties themselves and not be subject to the control or dictation of the arbitrator.

In the Division Courts Act, section 101-102, where the judge has clearly the discretion to examine the parties or not as he pleases, there is nothing uncertain or equivocal in the language which confers his powers.

In the present case I have no doubt the learned arbitrator acted entirely in perfect good faith, and with great discretion according to his own impartial view of the facts and of the situation of the parties. But I must lay down a rule which shall be applicable in every case where the caprices and prejudices of the arbitrator may require to be as much provided against as any other part of his conduct, or any other part of the power of his position, and I think it was the discretion of the parties on this point by which he should have been influenced, and not his own.

As I think there has been a serious failure of justice, I must set aside the award, but under the circumstances without costs.

*Per Cur.*—Rule absolute without costs.

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## J. & J. Taylor v. A. & B.

*Attorneys—Agents—Collection of money by clerk of latter—Right of Attorneys to apply directly against the agents.*

Where J. & J. T. having a claim within the jurisdiction of a Division Court against a resident of Belleville sent it to McM., an attorney, resident in Toronto, for collection, who sent it to A. & B., attorneys in Belleville, and the clerk of the latter collected $20 on account and sued for the remainder in the Division Court, and afterwards B., one of the attorneys, arranged with a third party for the payment of the balance, it was held that J. & J. T. were not in a position to make a summary application against A. & B. for the payment of the money, but that the same should have been made by and at the instance of McM. [Easter Term, 1865.]

*D. McMichael* obtained a rule calling upon A & B. to shew cause why they should not pay over to Messrs. J. & J. Taylor or their attorney $71 50, with interest from 1st December, 1863, or such other amount as the said attorneys have received from Wm. Kelly, or why they should not render a bill of their costs and charges and have the same taxed and why they should not pay the amount found due on taxation and why such further or other order should not be made as should be considered proper, and why they should not pay the costs of the application on grounds disclosed in affidavits and papers filed.

The affidavits and papers filed for and against the application shewed the following facts: That a promissory note which J. & J. Taylor had against Kelly amounting to $101 50 was delivered by J. & J. Taylor to J. S. McMurray, an attorney practising in Toronto, to collect. That as Kelly lived at Belleville, McMurray in December, 1863, sent the note, on which $30 had been paid to Taylor, to a firm formerly consisting of C. & A. but then composed of A. & B. to collect as Mr. McMurray says as his agents, his letter enclosing the note after describing it says he wishes C. & A. to collect it for him and he added "agency fee, &c." That one O., a clerk in the office of A. & B., by letter of the 15th of January, 1864, to Mr. McMurray stated that the note was then in suit in the Division Court. And by another letter of the 4th of April from the same to the same it was said the note had been put in suit and execution issued and no doubt the money would be soon made. Mr. McMurray further stated that he had frequently by letter and otherwise applied to the said A. & B. for a settlement of the said claim, that they or some or one of them had, as deponent was informed and believed, for their or on their account or behalf received the said monies or a portion thereof, but they refused and still do refuse and have failed to pay the said monies to deponent or to any one on his account, and they had not paid the same to the said J. & J. Taylor as deponent believed. That B. on the 7th of December, 1864, wrote to Mr. McMurray that a person who had promised to pay the money had not yet done so. That A. on the 6th of February, 1865, wrote to Mr. McMurray that he, A., had had nothing to do with the matter and knew nothing of it and would take no trouble about it.

Mr. Parker, the clerk of the Division Court, stated that about the 25th of January, 1864, O., a clerk in the office of A. & B., brought this note to the Division Court office to be sued; that judgment on the 26th of March, 1864, was given against Kelly for $44 debt and $4 25 for costs; that on the 10th of August, 1864, an execution was issued to R. H. Jones, bailiff of that court; that Jones on the 15th of September, 1864, obtained a document from B. of which the following is a copy:

"*Taylor* v. *Kelly*.

"Sir,—Mr. Kelly has settled with me for the amount of the debt. He has to settle with you for your costs. (Signed) B.

"15th September, 1864."

A. filed several affidavits from which it appeared his partnership with B. ended in April, 1864, that B. after the partnership still kept this claim in his hands and personally attended to it as a private matter of his own and that it never had been entered as a matter of business in the books of the firm.

B. filed the following affidavits: Mr. O., who swore that he received $20 from Kelly on the 23rd of January, 1864, that he then sued the note and had the management of the suit, that he did not pay over this sum as he was waiting till he should get the remainder, and that he had not yet paid it over to any one and that he never received the balance.

B. himself stated he handed the note when he got it to one of the clerks to attend to; that he did not know that $20 had been paid to O. until quite lately; that in September, 1864, when an execution was issued, Kelly brought him a letter from Mr. Frank, requesting that the execution should be withdrawn and stating that he would see it was all right, and being satisfied that Frank, who was in his opinion a responsible person would do so, B. gave the bailiff the memorandum produced. That four days after this arrangement he met with a serious accident and was unable to attend to business

for eight months; that after that time Frank became insolvent and had not paid the amount and is now living in Montreal; and that he, deponent, never intended to release Kelly, but simply to withdraw the execution to afford an opportunity for the assessment.

*Crombie*, for B., shewed cause.—The $20 received by O., the clerk, is not a sum for which the attorneys can be attached or be ordered summarily to pay over. They may be sued for it and as to the residue such a remedy as now pursued is quite inapplicable because the attorneys have not in fact by presumption or otherwise ever received the money. They acted in good faith on the arrangement they made, and if that has not turned out well they may be sued for what they did but they cannot be charged as with the receipt of the money. Such a proceeding as this can never be taken unless the attorneys have been guilty of fraud or a wrong. Now here has been no wrong, but if any one can apply at all it is Mr. McMurray, who, it is said, employed the attornies and not the present applicants who never retained them.

*Lauder*, for A., shewed cause, and contended that A. had never anything to do with the matter at all; that the $20 were received by O., who was B.'s clerk; that the partnership ended in April, 1864, and B. took this case as his own. That he was corresponded with after this date by Mr. McMurray as the only person having charge of the case, and the arrangement with Frank which is complained of was not made till nearly six months after the dissolution of the partnership and was made by B. alone, and that however B. was liable, A. was not. He also contended that this course of proceeding could not be taken against the attorneys, even as to the $20, because there had been nothing done by them which could properly be called wrong, and it was not pretended there was anything like fraud; *Ex parte Bodenham*, 8 A. & E. 959; *In re Aitkin*, 4 B. & Al. 47; *Collins* v. *Brooke*, 5 H. & N. 700; *Re Lord*, 2 Scott, 131; *Re Fenton*, 3 A. & E. 404; *Collins* v. *Griffith*, Barnes, 37; *Dicas* v. *Stockly*, 7 C. & P. 587; *De Woolfe* v. ——, 2 Chit 68.

*D. McMichael* contra.—As to the $20 the receipt of O., the clerk, was the receipt of the attorneys, his employers; and as to the remainder the arrangement made with Frank had the effect of making the debt the debt of the attorneys, but he was not disposed nor instructed to press the latter claim, for if his client could yet sue out an execution against Kelly it was all that was wanted; but his client's chief complaint was that he never could find out anything about the claim and it was only now for the first time that the facts had come to the knowledge of the client. He contended that the attorneys were directly responsible to his client having acted as his attorneys.

Adam Wilson, J., In Arch. Pr. 11 Ed. 152-3 it is said that when a town agent is employed the agent's name is usually inserted in the proceedings and record as the attorney in the cause. This, however, does not constitute any privity between him and the client when in fact he is acting only as agent.

The opposite party may, however, treat the agent so acting as attorney on the record as the actual attorney, but the party for whom the agent seems to be the attorney cannot sue such agent or treat him as his attorney when he is not attorney in fact.

In *Cobb* v. *Becke*, 6 Q. B 930, it was held that where the attorney of A., sent a sum of money to his town agents to pay over to a third person on account of A that on the refusal afterwards of the town agents so to apply the money, A. could not sue them, as he had no privity with them.

The case of *Moody* v. *Spencer*, 2 D. & R. 6, shows this to be approved of where the action was by the client, the plaintiff in the original cause, against the agent for money had and received to the client's use by their agent, from the opposite party the defendant in the original suit. The court saying when the agent got the money from the opposite party he did not get it to his own use nor did he get it to the use of the actual attorney of the client, it must, therefore, be treated as received to the use of the client. This case, however, does not seem to be supported in the latter case of *Robbins* v. *Fennell*, 11 Q. B. 248, nor is it necessary to the general principles applicable to such cases.

In the case last mentioned it was expressly determined that such an action would not lie under these very facts; but it was also held that a summary application lay against the agent at the instance of the client, because it afterwards turned out that the money did not come to the agents' hands in their character of agents for the attorney, "but was sent to them by the under sheriff out of the regular course of business;" and Lord Denman added, "I do not say that an action for money had and received might not upon the facts now disclosed be maintained, although there be no privity on the ground that the agents had improperly received the money of the plaintiff."

It was determined in the Exchequer Chamber in *Collins* v. *Brooks*, 5 H. & N. 700 affirming the decision of the Court of Exchequer in 4 H. & N. 270, that an action lay at the instance of an infant against the attorney in the cause for money had and received to his use by the attorney, although the attorney was appointed by the *prochein ami*, and such a case was distinguished for the case of client, attorney and agent. Crompton, J., said, "The London agent is the mere servant of the attorney, and the client has a right to treat everything which he does as the act of the attorney." Blackburn, J., said, "In many cases a person employed receives the money as agent for the middleman, and not for the principal..... In all those cases when the receipt is such that the loss of the money would be the loss of the middleman, there is I conceive no privity between the recipient or third person and the principal; and generally an action would not lie by the latter against the middleman, as in the cases which have been referred to, the receipt of the third person has been the receipt of his upon report. Thus in *Stephens* v. *Badcock* the receipt of the attorney's clerk instantly gave Stephens the plaintiff an action against the attorney. In *Robbins* v. *Fennell* the receipt of the town agent instantly made the attorney responsible."

The whole of this language is against the right of the Messrs. Taylor, the clients, to call upon these gentlemen, who were practising as attorneys, to render any account to them as such clients; because although these attorneys sued Kelly as attorneys for the Messrs. Taylor in the proceedings in the Division Court, yet they were not in fact his attorneys; and the English practice shows it is the usual course for the town agent to enter his own name in the suit as the attorney, yet he is not in truth the attorney of the client, but the agent only of the clients own direct attorney. The client in such a case has no claim upon him in any way, and there is no difference in this respect, according to the case of *Robbins* v. *Fennell*, between an action and a summary application. In neither case can the client sustain it against the agent. But if the agent have wrongly and improperly, and without authority received the money, he may be held directly liable to the clients, but such is not the present case.

I am therefore led to the conclusion that the Messrs. Taylor cannot support this application against these gentlemen, although it would seem they could do so against Mr. McMurray himself, by reason of his liability for the conduct of the sub-agents he employed (see in addition to previous cases *In re Ward*, 31 Beav. 1) and that Mr. McMurray in his own name could sustain an application against those gentlemen as immediately accountable to himself.

The whole case seems to have been loosely managed, and although no charge whatever has been made against these gentlemen but such as it was contended arose from their strictly legal liability, the same cannot be said of their clerk. He got the $20 in July, 1864. He never entered the receipt of it in his employers' books, nor did he ever inform them that he had got it, nor did he ever pay it to them; and he now makes affidavit of all these facts, and of the other fact that he has it yet in his own possession. Now he must know that this is the money of his employers, and not his own; and perhaps he may know also that he has confessed what may also be a criminal offence, or at all events very nearly approaching it.

In all these proceedings the Messrs. Taylor and Mr. McMurray are the persons really aggrieved, and yet I cannot help them in this application.

I am obliged to discharge the rule, but I shall discharge it without costs.

Rule discharged without costs.

## COMMON LAW CHAMBERS.

(*Reported by* R. A. Harrison, Esq., *Barrister-at-Law.*)

### In the matter of Wellington Crow.

*Habeas corpus—Conviction by one magistrate when two required—Effect of erroneous recital in warrant of commitment—Necessity to show before whom convicted—Several warrants—Periods of imprisonment running contemporaneously or consecutively.*

Where a statute empowers two justices of the peace to convict, a conviction by one only is not sufficient.

It lies on a party alleging that there is a good and valid conviction to sustain the commitment, to produce the conviction.

The warrant of conviction should show before whom the conviction was had.

An adjudication mentioned in the margin of the warrant of commitment, where there are several warrants of commitment, each for a distinct period of imprisonment, that the term of imprisonment mentioned in the second and third warrants shall commence at the expiration of the time mentioned in the warrant immediately preceding, is valid.

If the portions in the margin of the second and third warrants could not be read as portions of the warrants, the periods of imprisonment would nevertheless be quite sufficient, the only difference being that all the warrants would be running at the same time instead of counting consecutively.

[Chambers, 1865.]

This was a summons calling upon the Attorney-general or his agent to show cause why a writ of *habeas corpus* should not be issued in this matter.

The prisoner had been committed by the police magistrate of the city of Hamilton, on three several convictions for enticing, persuading and procuring soldiers to desert her Majesty's service.

There were several warrants of commitment. Each warrant recited a conviction "before me, James Cahill," the police magistrate, and concluded "Given under my hand and seal," &c., and each one was subscribed as follows:—"J. Cahill, police magistrate of the city of Hamilton; Robert Chisholm, ald.; P. Crawford, ald."

Each warrant was dated 11th March, 1863, and each numbered. One was numbered 1, another was numbered 2, and the third was numbered 3.

The first warrant directed imprisonment for six months at hard labor; the second six months at hard labor, and it had this memorandum in the margin, "The time mentioned in this committal to commence at the expiration of the time mentioned in another committal which is numbered number 1;" and the third warrant directed imprisonment for six months at hard labour, and had the like memorandum which was upon number 2, but stated that the time in number 3 was to commence from the expiration of the time mentioned in number 2.

*James Paterson* argued, for the prisoner, that the warrant was defective, because it showed the conviction to have been made by one magistrate, and that the terms of imprisonment in the warrants numbers 2 and 3 were defective and uncertain.

*R. A. Harrison*, for the Crown, argued that the conviction itself should be before the judge in Chambers, because the presumption was the conviction was correct, and it should be assumed that the warrant contained a misrecital of the conviction having been had only before the one magistrate; and it rested on the prisoner to complete his case by procuring the conviction; and that the periods of imprisonment in the warrants 2 and 3 were quite certain.

Adam Wilson, J.—The Mutiny Act in force when these convictions took place, was the 27th Victoria, chapter 3, section 81, which provides that the conviction shall be before two justices.

The conviction, therefore, if it be really in the form in which the warrant recites it to be, is erroneous and void.

Am I to assume that the conviction is in this defective form, or can the warrant containing a misrecital be considered as not void, or may it be amended, or can a new warrant be issued?

By the Consolidated Statutes for Canada, cap. 103, sec. 71, one justice may issue his warrant

of commitment after the case has been heard and determined, although the case required more than one justice to adjudicate upon it, and by sec. 72 it is not necessary that the justice who so issues his warrant shall be one of the justices by whom the case was heard or determined. It would seem, therefore, to be immaterial as a fact, whether or not that part of the warrant is true, that the prisoner was convicted before Mr. Cahill.

Is it necessary, however, that it should appear before whom he was convicted? In all the forms which are given of warrants of this nature in the schedules to the statute, it is prescribed that the fact shall be recited. In *Rex* v. *York* 5 Burr. 2684, the warrant of commitment stated that the prisoner had been brought "before me and convicted;" and Lord Mansfield, C. J., said, "This was upon conviction, and it ought to be shown that the person convicting had authority to convict. It is a commitment in execution. Here it does not appear by whom they were convicted. It is only said in the warrant, 'brought before me and convicted.' The not showing before whom they were convicted is a gross defect. Let them be discharged." In *the matter of Addis*, 2 D. & R. 167; 1 B. & C. 687, it appears if the warrant of commitment be bad, and the party be discharged from it, that a new warrant of commitment may be issued upon the conviction, if that be sufficient to justify a warrant. See also *Egginton* v. *The Mayor of Lichfield* 1 Jur. N. S. 908. In *The King* v. *Rhodes* 4 T. R. 220, the warrant of commitment recited that the party had been charged—it did not say convicted—before the magistrate, and the warrant was held bad for that cause. Buller, J., said, "The only question is, whether the warrant, on the face of it, be a good commitment in execution; and that it is not cannot be doubted, first, because the party was not previously convicted," &c. And Grose, J., said, "Therefore this warrant is bad, because it only states that the party had been charged with, not that he had been convicted of, the offence." See also 12 East. 78, note (*a*); and *The King* v. *Casterton*, 6 Q. B. 509. In *The matter of Peerless* 1 Q. B. 154, Coleridge, J., said, "Of the conviction we know nothing, except through the warrant." See *Reg.* v. *Lordoft* 5 Q. B. 940; *Reg.* v. *Cavanagh* 1 Dowl. N. S. 552; *Reg.* v. *King*, 1 D. & L. 723. It lies on the party alleging there is a good and valid conviction to sustain the commitment, to produce the conviction (1 D. & L. 846). In this cause the conviction has not been brought before me. All I have seen is the warrant, and that recites a conviction before one magistrate only. I cannot infer from this, that the prisoner was convicted by two magistrates, and the warrant does not show jurisdiction in one magistrate to commit.

I think the adjudication that the imprisonment in the second and third warrants shall commence at the expiration of the time mentioned in the warrant immediately preceding it, is valid (see sec. 63 of cap. 103); and I think it is so stated as properly to form part of the warrant.

I may add, as to the imprisonment, if the portions in the margin of the second and third warrants could not be read as parts of these warrants, the periods of imprisonment would nevertheless be quite sufficient. The only thing would be that all the warrants mentioned would be running at the same time, instead of counting consecutively.

The order must go for the issue of a writ of *habeas corpus* to bring up the body of the prisoner.

Order accordingly.*

## CHANCERY.

(*Reported by* Alex. Grant Esq., *Barrister at Law, Reporter to the Court.*)

### Hagarty v. Hagarty.

*Alimony.*

The purpose of allotting alimony to a wife is to afford her the means of supporting herself whilst living apart from her husband; but as the law does not contemplate the parties living apart for life, but looks forward to a reconciliation between them, the court will not sanction the payment by the husband of a sum in gross, in lieu of an annual sum by way of such alimony,

This was a suit for alimony in which a decree had been made declaring the plaintiff entitled to an allowance by way of alimony, and referring it to the Master to settle what sum should be paid by the defendant to his wife (the plaintiff). In proceeding under the decree, the Master, with the assent of both parties, found that a sum in gross should be paid by defendant to the plaintiff, and which was to be accepted by her in full of all future claims under the decree.

The cause afterwards came on to be heard for further directions.

*J. McLennan* for plaintiff.

*Bull* for defendant.

Spragge, V. C.—In this case the Master, with the assent of the parties, fixed the alimony to be allowed to his wife at a gross sum, instead of at so much per annum, to be paid monthly, or quarterly, as is usual: and counsel for both parties ask the sanction of the court to this allowance.

If the parties choose to make any arrangement out of court, the court has nothing to say to it, but, when the sanction of the court is asked, it is incumbent on the court to see that it sanctions nothing that is not in accordance with the law of the court.

When this matter was before me on further directions, I said, it struck me that the arrangement sanctioned by the Master was objectionable, as against public policy; and after further consideration that is still my opinion. In the books I find no instance of any such order; but I find alimony treated as due to the wife for her daily support. In Mr. Pitchard's book it is stated to be the ordinary rule of the court to decree it to be paid quarterly, and in *Wilson* v. *Wilson* Eccl. R. 329, where the application was to enforce the payment of the same for several years, the court said "Alimony is allotted for the maintenance of a wife from year to year."

In favour of the arrangement it is said that it makes the wife secure for so much money, whereas if payable from year to year the husband might evade payment: that is a reason of convenience; against which it may be said that if a sum be paid in gross to the wife she would be apt to live

* Before the writ of *habeas corpus* was given to the gaoler, valid warrants of commitment had been placed in his hands, so that the prisoner was not discharged.—Eds. L. J.

upon her capital; and at no very distant period probably be left destitute.

But the reasons against this arrangement, on grounds of public policy, appear to me to be very strong. The law does not contemplate that the husband and wife will live apart for life; but looks forward to their reconciliation; and so the sentence of divorce *a mensa et thoro* by the ecclesiastical courts was only "until they shall be reconciled to each other," and the sentence of judicial separation under the present law is doubtless in similar terms. The arrangement in question buys off the wife for life; it takes away one inducement on the part of the husband for reconciliation; its tendency is perpetual separation.

It is open to this further serious objection. The wife is entitled to her alimony only so long as she leads a chaste life. A wife separated from her husband is exposed to great temptations, every provision that tends to keep her from falling is valuable; this arrangement would remove one safeguard.

Under the Imperial Divorce and Matrimonial Causes Act, the court when decreeing a *dissolution* of marriage, which can only be by reason of adultery, may order the husband to secure to the wife a gross sum of money or an annual sum; but in those clauses of the statute which relate to *judicial separation* there is no such provision; but the enactment is simply this, that the court may order the payment of alimony; which I understand to mean alimony according to the ordinary course of the ecclesiastical courts, and not a gross sum.

The distinction is marked—where the woman ceases to be a wife a gross sum may be paid to her; but where she remains a wife there is no authority for such a payment. I must add that the reasons against it appear to me so weighty, that in my judgment the court ought not to approve of the arrangement proposed. There must be a reference back to the Master to allow alimony in the usual way.

## UNITED STATES REPORTS.

### SUPERIOR COURT.

Before Robertson, C. J., Garvin and McCunn, J.J.

### Wilkins v. Earle et al.

*Liability of innkeepers for money lost from safe.*

Continued from p. 279.

The common law creates the contract between the traveller and his host. The statute of 1855 defines more clearly the duties of the parties, and if the guest neglects to comply with his part of the statutes, by placing his money in the safe and it is stolen, it is his loss alone. But if the innkeeper assumes the risk, by taking the money in his safe keeping, his liability to such guest is rendered positive and certain, and the consideration is the large sum demanded for the guest's keep, together with the lien the innkeeper has on such money and goods until such keep is paid.

It is contended for, in the opinion of the court, that it would be unjust for a traveller to bring in any amount of money or valuables to an inn, and, without notice, make the innkeeper liable. The simple answer to that proposition is this: That this is not a case of that kind. Here the innkeeper had the money placed in his safe-keeping, and had sufficient notice of the contents of the package—such a notice as satisfied him, and he thereupon entered into the obligation of taking care of the money for the consideration of the guest stopping at his inn, and the common law says, the defendant shall be responsible for the loss, especially if that loss takes place from the negligence of servants of the defendant. If this rule was not the proper one, how easily an innkeeper could conspire with his servants and rob his guests; whereas, the innkeeper at all times has a perfect security against his guests by simply asking the guest what are the contents of your package, and if he finds it too large, by refusing to receive it. The guest, however, has no such safeguard against the dishonesty of innkeepers and their servants, if this grand old rule of common law is to be abolished.

As to the question of notice, I hold that it is not necessary at common law that the guest should notify the innkeeper of the amount of money. The question of negligence cannot come up, for the innkeeper is liable without reference to any degree of care or negligence on his part. Chancellor Kent holds that is not necessary to prove negligence in an innkeeper—the innkeeper is liable as an insurer of the property and money of his guest, and this liability is founded on the principle of public utility, to which all private considerations ought to yield: 2 Kent's Com. 760, 7th ed., and cases there cited.

It is, therefore, at common law, unnecessary that the guest should notify the innkeeper of the particular amount of property or money left with him, and it is no argument against the innkeeper's liability to say that, if the guest had notified him of the particular amount of money he was leaving with him, in such a case the innkeeper would have exercised greater care, as the innkeeper is liable without reference to any degree of care or negligence on his part.

The statute of 1855 requires that a safe must be kept in which a guest may deposit his money. This increases public confidence and security to guests, and it must be presumed therefore that the Legislature intended that guests would be influenced by this increased confidence and avail themselves of the additional security. It cannot be justly said, that $3 per day is not adequate to the risk, because if not adequate they must make the contract with the guest for a larger consideration; and second, by analogy to the risk that insurance companies take are the very small premiums they receive and the enormous losses they frequently sustain, it may be said that the consideration of $3 per day is large. But to return to the question of notice on the part of the guest. The learned Chief Justice, in his able opinion, denies the sufficiency of the notice given by the plaintiff to the defendants of the contents of the package, when it was entrusted to the defendant for deposit in his safe, and says that "a notice, to be sufficient to release the plaintiff from the imputation of negligence, should be not only of the kind of property, but its value." When the package containing the money was handed to the defendant's agent at

the office, to be deposited in the safe, the defendant, by his agent, asked the plaintiff "what it contained?" the plaintiff answered "money." This description and notice were then satisfactory to the defendant, and the package was so marked.

The description satisfied defendant then—he asked for no other, but with that description took charge of the "money." I think he should now be estopped from saying the notice was not sufficient; the contrary doctrine would lead to great frauds.

If the notice was insufficient and was not a satisfactory compliance with the statute on the part of the plaintiff, and did "impute negligence to the plaintiff," then, I am unable to see on what theory the plaintiff could recover anything at all. I am unable to see why the notice should be insufficient to allow the plaintiff to recover all the money received by the defendant on the notice, but sufficient to allow him to recover a part. If the notice was insufficient under the statute (and if the question of notice is in any way controlling), then the plaintiff should not have recovered anything; but it being conceded that he should recover at least one thousand dollars and costs, I think from that concession alone it follows he should recover the whole of his loss. I am clear that the notice to the defendants, of the contents of the package entrusted to and received by him, was, under the circumstances of this case, sufficient.

It has been urged by the counsel for the defence, and a conclusion to that effect has been drawn in the leading opinion of the court, that the cause is analogous to that of the common carrier. I do not entertain any such conclusion of the similarity.

Formerly it was held that a carrier of passengers was not answerable for baggage at all, unless a distinct price was paid for it. This never was the rule with inkeepers, and the reasoning both of the statute and common law, by which the doctrine of the liability of innkeepers, without proof of fraud or negligence, is maintained, is, that travellers are obliged to rely almost entirely on the good faith of innkeepers, that it would be almost impossible for them, in any case, to make out any proof of fraud or negligence in the innkeepers, and that therefore the public good and the safety of our large travelling community require that innkeepers should be held entirely responsible for the safe keeping of the goods of guests, and the same reasoning would hold them alike responsible for money. Another reason why common carriers are sometimes excused for the loss of large sums of money, when packed in trunks, and so lost, is, that it is not presumed that a traveller would carry large sums of money in trunks, with his clothing, but would rather be presumed to carry such large and valuable sums of money about his person, while travelling, which latter presumption ceases when the traveller arrives at an inn, where the law provides a place of safety for such money, and where the innkeeper is held liable for any loss arising through his neglect.

This much have I reasoned, and said why this defendant should be held responsible for the loss of the money. Now, let us examine the decisions from the time of the earliest cases to the present on the subject.

One of the earliest decisions we find reported is that of Caly's case, tried in the Queen's Bench, during the reign of Elizabeth (8 Coke, 33), and there it is clearly annunciated as law, that the "innkeeper is responsible if the guest is robbed in his house," and I find on a careful examination of the English authorities that such is held to be the invariable rule of law in the courts of that country to this day. In the case of *Kent* v. *Shukland*, 21 Barn. & Adolph. 808, Lord Tenterden, it was held (all the other judges concurring), that innkeepers were liable for all moneys as well as goods of a guest, and that there was no distinction between money and goods. In the case of *Coggs* v. *Barnard*, 1 Smith's Leading Cases, 309, it is expressly held that the innkeeper's liability is not restricted to such sums as are required for travelling expenses, and the same rule was held by Holt, Chief Justice, in the case of *Lane* v. *Cotton*, 12 Mod. 487; and the very learned and able Judge Cowan, in the case of *Cole* v. *Goodwin*, 19 Wend., holds a similar doctrine, so that it cannot be said that we are at sea as to the extent of the liability of innkeepers. Since these leading cases, both English and American, adjudicated upon by the most learned of men, all fix the liability of the innkeeper to any sum of money the traveller may have within his possession and entrusted to the innkeeper in manner before specified.

Indeed, in the case of *Piper* v. *Manny*, 21 Wend. 282, Chief Justice Nelson carried this doctrine so far as to hold that an innkeeper was liable for the safe keeping of a load of goods belonging to a traveller who stops at the inn, even if the servant of the inn designates an open space near the highway for the goods to be placed.

In the case of *Ivanson* v. *Havre de Grace Bank*, 6 Har. & Johns. 47, 68, the court after stating the position that if A. sends his money by his friend, who is robbed at the inn at which he is a guest, say A. shall have the right of action. Now, certainly, this money of a friend was not for travelling expenses, it was simply a part of the money and goods of the guest, whom the innkeeper had undertaken to entertain as his guest, and around whom the great common law of our land throws its ample protection against the frauds of innkeepers; and this safe doctrine is also promulgated in the case of *Mason* v. *Thompson*, 9 Peck, 280.

The case of *Bennett* v. *Mellor*, herein cited, is a case where a guest left a sleigh-load of wheat in an outer-house belonging to the inn. The wheat was stolen, and the innkeeper was held liable. Certainly the wheat was not traveling expenses? And the like rule was held in case of *Hallenbeck* v. *Fish* (8 Wend. 547). There the innkeeper was held responsible for the loss of a set of harness placed in a barn by the innkeeper's man, and in the case of *Jones* v. *Taylor* (1 Adolph. & Ellis, 522), the innkeeper was held responsible for a gig that was placed in front of the inn on the common highway.

Mr. Justice Fletcher remarks that the principle contended for, that innkeepers are liable for such sums only as are necessary and designed for travelling expenses by the guest, is un-

supported by any authority whatever, and wholly inconsistent with the principle upon which the liability of innkeepers rests. And the same rule was held good by Chief Justice Bronson in the case of *Mall* v. *Cook* (8 Hill, 485), and reiterated in the case of *Macdonald* v. *Egerton* (5 Barb., 506), and *Bennett* v. *Mellor* (5 Term R., 273), and this safe doctrine was re-annunciated in the late case of *Gile* v. *Libby* (36 Barb., 741). In the case of *The Woollen Company* v. *Proctor* (7 Bushing, 417), where an agent of the Company was robbed at the inn of a large amount of money belonging to the Company, it was held that a recovery was not limited to travelling expenses, and certainly the case at bar is a much stronger case in favor of the plaintiff than the one last cited, for there the agent was robbed by some outside party, of money not his own, but here the plaintiff was robbed of his own money, by one of the servants of the innkeeper. In North Carolina, it was held, in the case of *Trenton* v. *Hay*, that a traveller alighting at an inn, and delivering his saddle bags, containing a large amount of money, to a servant, but did not inform the innkeeper that there was money in the bags; the money was stolen, and the tavern-keeper was held liable. See also the case of *Dwight* v. *Brewster* (1 Peck, 50), and *Taylor* v. *Monnot* (4 Duer [in this Court], 116), where a similar doctrine is maintained, and Mr. Justice Story lays down as an elementary principle a doctrine that completely meets this case. He says, at chapter 6, section 481, page 456, of his Commentaries: "So the innkeeper will be liable for the loss of the money of his guest, stolen from his room, as well as for his goods and chattels, and that this liability extends to all the movable goods and money of the guest, placed within the inn, and is not confined to such articles and sums only as are necessary and designed for ordinary travelling expenses of the guest."

But why enumerate cases; the doctrine is as old as our common law. Indeed, to hold a contrary rule, without authority or precedent, is to cast loose from the safe moorings of the old common law, rendered dear to us by the adjudications of the most learned men of the Bench, for centuries past, both in the old and new worlds, and I am satisfied that a contrary doctrine would be terrible in its effects in this great commercial community of ours, where our business men necessarily spend a large portion of their time at inns, in the pursuit of their calling.

This much I have said on the clearly adjudicated cases. Now, let us see what the ablest elementary writers say on the subject, and for that purpose I shall only cite a few of the most eminent of English and American writers. Sir William Blackstone, from whom every willing student draws the true maxims of sound law, says (1 Black. Com., 430): "If an innkeeper's servant robs his guest, the master is bound to restitution, for as there is confidence reposed in him that he will provide honest servants, his negligence is an implied consent to the robbery." This elementary principle completely covers the case under consideration.

Our great commentator, Chancellor Kent, in speaking of the liability of innkeepers, lays down this clear and undisputed principle, that the innkeeper is bound absolutely to keep safe the property of his guest deposited within the inn, whether the guest acquaints the innkeeper that the goods were there or not. Moreover, he says the responsibility of the innkeeper extends to all his servants, and to all goods and chattles, and all moneys of the guest placed within the inn, and he adds that the safe custody of the goods and money of the guest is a part of the contract to feed and lodge for a suitable reward, and then it is not necessary to prove negligence in the innkeeper, for, says he, "it is his duty to provide honest servants." What can be plainer than this, and what can be more in consonance with common sense, as well as clear common law, and I am satisfied this doctrine will put to violence the theories that there is no consideration for the extra risk entered into by the innkeeper for keeping the money; the consideration is the enormous charge of the innkeeper for the entertaining and caring for his guest.

To the lawyer and scholar, the names of Sir Wm. Blackstone and Sir Wm. Jones on the one side of the ocean, and Chancellor Kent and Justice Story on this, will be sufficient for my purposes in this case until some author or some case is cited, showing clearly that a contrary doctrine should obtain. It must follow, therefore, and I am satisfied from all my research that the rule of law, to wit, that the innkeeper is responsible for all moneys deposited with him, is the correct and standard rule.

This is not the first instance this vague question of travelling expenses has been interposed by innkeepers and urged by their counsel, in order to avoid their responsibility, but it has always been repelled, and it will be seen that, in many of the cases I have cited, the question has been treated and disposed of by a flat denial of such a dangerous doctrine.

The rights of parties, and such important rights as these under consideration, affecting, as they do, in their results, our whole travelling community, must be determined by sound law, handed down to us by the most eminent men, and not by any vague, undeterminate and partial usage or *dicta* of persons or places. A strict adherence to this principle is particularly essential, in this day, to sound and consistent administration of justice, and a departure from such a course works great injustice—for no man could know what were his rights or his duties, unless they are clearly defined by the precedents of the earlier times, declared by those great living lights and champions of just and wholesome law.

The judgment should be affirmed with costs. —*N. Y. Transcript.*

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*Supreme Court of Errors of Connecticut.*

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William Morris *v.* Delos Platt and Another.

A man who is assaulted under such circumstances as to authorize a reasonable belief that the assault is made with a design to take his life, or inflict extreme bodily injury, will be justified, in both the civil and criminal law, if he kill or attempt to kill his assailant.

The question whether the belief was reasonable or not must be passed upon by a jury, but a person does not act in such a case at the peril of making that guilt, if appearances prove false, which would be innocence if they proved true.

It is well settled that a man is not liable in an action of trespass on the case, for an unintentional consequential injury resulting from a lawful act, where neither negligence nor folly can be imputed to him; and there is no reason for a different rule where the injury is immediate and direct, and the action trespass.

Where a person in lawful self-defence fires a pistol at an assailant, and, missing him, wounds an innocent by-stander, he is not liable for the injury, if guilty of no negligence.

While this is the result of the application of well settled legal principles, it is questionable whether, in view of the too general practice of carrying firearms, and the danger to innocent persons from their use, there should not be some legislation changing the rule of law in such a case, or otherwise protecting the public.

It is not the proper course for a judge to lay down the general principles applicable to a case, and leave the jury to apply them, but it is his duty to inform the jury what the law is as applicable to the facts of the case.

The facts of a case are to be found by the jury, unless admitted, and the judge can only regard them as claimed, for the purpose of applying the law to them contingently, if found; and he cannot properly refuse to charge upon the facts claimed on the ground that in his opinion they are not proved.

Trespass for an assault. Verdict for plaintiff, and motion for a new trial.

*Kellogg*, for the motion.

*H. B. Munson* and *Doolittle*, contra.

The opinion of the court was delivered by

Butler, J.—Upon a careful examination of the important questions presented upon this record, I do not see how the omission of the court to charge as requested on the first point, or the charge actually given on the second, can be vindicated, and the verdict sustained.

1. It appears from the evidence offered on the trial that the defendant wounded the plaintiff in two places by two shots fired from a pistol; and from the nature of the weapon, and the other conceded circumstances, the jury were authorized to find, and doubtless did find, that the wounds were inflicted with a design to take the life of the plaintiff. It was incumbent on the defendant to justify or excuse their infliction. He in the first place attempted to justify them, and the obvious attempt to take life which aggravated them, by offering evidence to prove that he was assailed by the plaintiff and others in a manner which indicated a design to take his life, and "that he was in great bodily peril and in danger of losing his life by means of the attack," and that he fired the pistol "to protect his life and his body from extreme bodily injury." If these facts were proved and found true, they fully justified the attempt of the defendant to take the life of the plaintiff as matter of law, and entitled the defendant to a verdict in his favor. And so the court were bound to tell the jury, if properly requested to do so by the defendant.

The motion further shows that the defendant did in substance request the court to charge, that if they found the fact proved as claimed, he would be justified in self-defence in using the pistol as he did—that the rule of law is "that a man may lawfully take the life of another who is unlawfully assailing him, if in imminent peril of losing his life or suffering extreme bodily harm, &c." What a man may lawfully do, he may lawfully attempt to do; and that request embodied in substance, and with sufficient distinctness, a well settled specific rule of law, applicable alike in criminal prosecutions and civil suits, and to the facts of the case as claimed.

The court did not conform to the request. The charge as given informed the jury what "the great principle" of the law of self-defence is, and correctly; but that was not all to which the defendant was entitled. It is not for juries to apply "great principles" to the particular state of facts claimed and found, and thus make the law of the case. When the facts are admitted, or proved and found, it is for the court to say what the law as applicable to them is, and whether or not they furnish a defence to the action, or a justification for the injury, if that be the issue. And so where evidence is offered by either party to prove a certain state of facts, and the claim is made that they are proved, and the court is requested to charge the jury what the law is as applicable to them, and what verdict to render if they find them proved, the court must comply. This is not only the common law rule, but it is carefully and explicitly declared in this State by statute, that "it shall be the duty of the court to decide all questions of law arising in the trial of a cause, and in committing the cause to the jury to direct them to find accordingly." Rev. Stat. tit. 1, sec. 144. Here the rule of law applicable to the facts claimed is as well-settled and specific as any rule of law in the books, and it was the duty of the court to give it to the jury as requested, and direct them if they found the facts as claimed to find a verdict accordingly. And if it were otherwise, and a specific rule settled by authoritative adjudications, in which the great principle had been applied to a similar state of facts, did not exist, it would still have been the duty of the court to apply the principle to the facts, and to tell the jury whether or not they furnished a justification in law to the defendant, for that, in the language of the statute, was "a question of law arising in the case."

The first request of the defendant which we are considering involved the finding of two principal facts, viz., first, whether the plaintiff was one of the assailants, and, second, whether the assault was made with the design to take the life of the defendant or inflict upon him extreme bodily harm. But the jury might find upon the evidence that the plaintiff was one of the assailants, and fail to find the design to take life imputed to him. To meet such a contingency the defendant added to his request, that the court should charge the jury, "that when, from the nature of the attack, there is a reasonable ground to believe that there is a design to destroy his life or commit any felony upon his person, the killing of his assailant will be excusable homicide, though it should afterwards appear that no felony was intended;" but the court did not so charge, because, as the motion states, the court did not consider that the facts of the case required such instructions.

The facts of a case are to be found by the jury unless admitted, and the court can only regard them as claimed for the purpose of applying the law to them contingently if found. When, therefore, the motion states that the court did not think the facts of the case required the instruction claimed, as the material facts were in dispute, it must be intended that the court was of opinion that there was not any such law as claimed, applicable to the facts as claimed.

(*To be continued.*)

## GENERAL CORRESPONDENCE.

To the Editors of the Law Journal.

Gentlemen,—Among the many questions you have kindly answered through the medium of your valuable journal for the law students of Upper Canada, with reference to articles of clerkship, I trust you will be kind enough to answer this:

An articled clerk serves an attorney for a period of one year under an assignment of his articles, when a second assignment takes place. The attorney refuses to certify to his service at the date of the last mentioned assignment, saying he would leave it a matter for his future consideration. Should the clerk apply for an order now, to compel the attorney to certify to his articles, or wait until the expiration of his original articles?

Yours truly, Law Student.

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[We know of no law by which the student can *compel* his master to give this certificate, until such time as he requires it for the purposes of admission. When that time arrives, he can, if necessary, apply to the court for a mandamus, or *may* obtain relief from the Society, within the scope of their powers, upon making out a very clear case. And if any damage should arise to the student from refusal of the master to give a certificate when called upon at the proper time to do so, without his being able to give a sufficient reason, an action on the case would accrue to the student.—Eds. L. J.]

## REVIEWS.

An Act to amend the Insolvent Act of 1864, with Annotations, Notes of Decisions, and a full Index. By J. D. Edgar, Esq., of Osgoode Hall, Barrister-at-Law. Rollo & Adam, Law Publishers, Toronto. 1865.

The above, from the industrious pen of Mr. Edgar, the annotator of the Insolvent Act of 1864, will be found a useful postscript to his former book. The act of 1864 was found defective in many respects, and it became necessary to amend it, which was done by the act of last session, which Mr. Edgar gives in full, with notes explanatory of the defects intended to be remedied, and of decisions which tend to interpret the enactments. It is only necessary to say that these notes seem to have been prepared with the same care as those to the act of 1864.

He gives also a collection of "notes of decisions," which he prefaces with the following observations:

"Since the first of September, 1864, when the Insolvent Act came into force, a great many questions have arisen as to its interpretation, and a number of valuable decisions on doubtful points have been made. These cases, unfortunately, have rarely been reported, from the fact that they came only before our County Court Judges. The Editors of the *Upper Canada Law Journal* have made commendable efforts, however, to preserve these decisions, and most of the following are taken from their reports. Very few appeals have been made to the Superior Courts, considering the number of insolvency cases. It is thought advisable to put the cases below upon record as useful, although they may not all be found to be unimpeachable decisions."

We may mention here that *all* these cases will be found in the *Law Journal*, *Willson* v. *Cramp* (the note of which case is taken by Mr. Edgar from 11 Grant) having been reported expressly for the *Law Journal*, and is on page 217 of the current volume.

With respect to the above remarks of Mr. Edgar, we are only sorry that we have been unable, owing to the want of thought (we shall not call it *apathy*) of some of those who might well have helped us, to give more reports of cases decided under the Insolvency Act than have already appeared in our columns. We trust that this hint may not be in vain.

The pamphlet winds up with a full and most useful index.

## APPOINTMENTS TO OFFICE.

NOTARIES PUBLIC.

JAMES HOSSACK, of the town of Cobourg, Esquire, Barrister-at-Law, to be a Notary Public for Upper Canada. (Gazetted October 7, 1865.)

CORONERS.

WILLIAM BURR TERRY, of the township of North Gwillimbury, Esquire, to be an Associate Coroner for the United Counties of York and Peel. (Gazetted Oct. 7, 1865.)

PETER DAVY DAVIS, of Adolphustown, Esquire, to be an Associate Coroner for the County of Lennox and Addington. (Gazetted October 7, 1865.)

## TO CORRESPONDENTS.

"Sheer Hulk."—Time and space do not permit the insertion of your interesting communication in this issue, but it will appear in our next.

"Lex"—In current number of *Local Courts Gazette*.

"Utile Dulci."—Too late; will appear in next number of *Local Courts Gazette*.

"Law Student."—Under "General Correspondence."

## DIARY FOR DECEMBER.

1. Friday N. T. Day Q. B. Clerk of every Mun. ex. Co. to [ret. number of res. rate-payers to R.G.
2. Satur . Michaelmas Term ends.
3. SUN. .. *1st Sunday in Advent.*
4. Mon. .. Last day for notice of trial for County Courts.
8 Friday *Con. B. V. Mary.*
9. Satur.. Last day of service of York and Peel.
10. SUN... *2nd Sunday in Advent.*
12. Tues... Qr. Sess. and Co. Ct. sittings in each County.
14. Thurs. Last day for Coll. to ret. roll to Chamb. or Treas.
17. SUN... *3rd Sunday in Advent.*
18. Mon. .. Recorder's Court sits. Nomination of Mayors.
19. Tues... Declare for York and Peel.
21. Thurs. *St. Thomas.*
24. SUN... *4th Sunday in Advent.*
25. Mon. .. Christmas Day.
26. Tues... *St. Stephen.* [York and Peel.
27. Wed. .. *St. John Evang.* . Last day for notice of trial for
28. Thurs. *Innocents.* Sitt. Court of Error and Appeal com
30. Satur.. Last day on which remain. half G. S. P. payable.
31. SUN... *1st Sunday after Christmas.* End of Mun. year

## NOTICE.

*Owing to the very large demand for the* Law Journal *and* Local Courts' Gazette, *subscribers not desiring to take both publications are particularly requested at once to return the back numbers of that one for which they do not wish to subscribe.*

THE

# Upper Canada Law Journal.

DECEMBER, 1865.

## COMMON CARRIERS.

The necessity for some legislative enactment on this subject, as connected with the too common practice, to which common carriers, particularly railway companies, are addicted, of exempting themselves from liability by imposing special and unreasonable conditions, has lately been again discussed in the court of Queen's Bench.

Whilst admitting that some of the principal reasons, in which originated the strict rule of law as to the liability of common carriers, have passed away with the change of customs and means of transit and traffic that have taken place of late years, it cannot, on the other hand, be denied that it is going to the other extreme to allow public companies to bind the travelling and trading community by all sorts of unreasonable and unfair conditions—conditions not only unreasonable in themselves, but, generally speaking, practically unknown to any but the managers or servants of the company imposing them.

These conditions are, generally, kept in the background; they are often printed in small type in some inconspicuous place in a way-bill, bill of lading or receipt, or whatever the document may happen to be called. Even if the forwarder *is* aware of them, he is not generally in a position to help himself, and must submit to them or else give up business altogether, as there is probably only the one means of transit. In fact, he is, under such circumstances, the victim of a monopoly.

Our attention has been drawn to this subject by the late cases of *Hamilton* v. *The Grand Trunk Railway Co.* 23 U. C. Q. B. 600, and *Bates* v. *The Great Western Railway Co.* 24 U. C. Q. B. 544 (also published in another place in this *Journal.*) In the former case the company received certain plate glass to be carried for the plaintiff, who signed a paper, partly written and partly printed, requesting them to receive it upon the conditions endorsed, which were that the company would not be responsible for damage done to any glass, &c., and the defendants gave a receipt for the glass with the same conditions upon it. The evidence shewed that the damage sued for arose from the gross negligence and improper conduct of the defendants' servants. The court yielded to the authority of decided cases, and held that such a delivery and acceptance formed a special contract, which was valid at common law and exempted the defendants from liability. But the Chief Justice, in giving judgment, intimated that, if it had not been for the weight of authority, he would have decided that such special contracts are a violation of the principles of the common law, which imposed and enforced duties on common carriers for the protection of the public; but though he could not shake off the impression that they are contrary to the public policy so frequently enunciated and so much lauded in the older cases, he was obliged to hold that they are binding.

In the latter case, the declaration stated that the defendants, being common carriers by their railway, received from the plaintiff certain cattle to be carried from Ingersoll to Toronto; and the breach of duty alleged was, that they negligently and improperly detained the cattle at Ingersoll, and kept them in an open and exposed place, owing to which two of them died on the journey, and that, by the unreasonable delay in the carriage and delivery of the others, the plaintiff lost a market, &c.

To this the defendants pleaded a special contract—that the plaintiff undertook all risk of loss, injury or damage in loading, unloading, conveyance and otherwise, arising from the negligence, default or misconduct, criminal or otherwise, on the part of defendants; and that they did not undertake to forward the animals by any particular train, neither were they responsible for the delivery of the animals within any certain time, or for any particular market.

On demurrer, it was held that the plea was good; that the parties could lawfully enter into such a contract; that having done so, their rights and liabilities must be ascertained by the terms of it, and not by the common law.

In both these cases the court alluded to, and deplored the present state of the law, and suggested the propriety of legislative redress as the only means of putting the public upon a fair footing with companies who are *not*, in reality, owing to the present system of special conditions, "common carriers," in the sense that a lawyer would use the words. The defect in the law, which we are now complaining of, was also experienced in England; and Baron Parke, in *Carr* v. *The Lancashire and Yorkshire Railway Co.*, 7 Ex. 708, suggested the same remedy, when he said that it was not a matter for the interference of the courts, "but must be left to the legislature, who may, if they please, put a stop to this mode, which the carriers have adopted, of limiting their liability."

And now as to what statutory alteration should be made in the law. We are not at a loss for a guide in this, for we have the English statute, 17 & 18 Vic., cap. 31, sec. 7, which, with such modifications as the requirements of business in this country or the experience of mercantile men might suggest, would, we think, in a great measure remedy the evils complained of. The enactment is to the following effect:—

That every company (confined in England to railway and canal companies) shall be liable for all loss or injury to any animal or thing in the receiving, forwarding or delivery of them, occasioned by the neglect or default of such company, notwithstanding any notice or conditions made or given by such company contrary thereto; every such notice or condition being declared null and void. Provided that such company may make any co[illegible] the premises, which shall be adjudged [illegible] court or judge before whom any [illegible] affecting the matter is tried, to be j[illegible] reasonable.

The section makes further provis[illegible] ing the *amount* of the liability of the [illegible] in certain cases, unless the value is [illegible] to them and an extra payment made [illegible] of the value is on the person claiming [illegible] sation, and no special contract shall be [illegible] unless signed by the person deliv[illegible] goods for carriage.

The facts of the case of *Allday* v. *The [illegible] Western Railway Co.*, 11 Jur. N.S. 1[illegible] to by the Chief Justice in *Bates* v. *The [illegible] Western Railway Co.*, as exemplifyi[illegible] benefit of the English act, were as [illegible] the plaintiff delivered cattle to the defe[illegible] to be carried to B station, and at the [illegible] time signed a ticket, containing certa[illegible] ditions, whereby the company claimed [illegible] nity "from any consequence arising [illegible] over-carriage, detention or delay in, or [illegible] tion to the conveying of the said a[illegible] however caused." The cattle were over[illegible] ried, and suffered in consequence. The [illegible] held that the deterioration of the cattle w[illegible] "injury" within the statute already re[illegible] to, and that the condition attempted [illegible] imposed was an unreasonable one.

We may mention that the American [illegible] take a somewhat more liberal and equ[illegible] view of the law on this subject. Our re[illegible] will find in the *Repertory* a late Ame[illegible] case bearing on it.

The courts have done their duty in poi[illegible] out the defects in the law. The mod[illegible] remedying the evil is hinted at in the case[illegible] our own courts, and is now brought [illegible] prominently before the public. It rem[illegible] therefore, for the Legislature to pass suc[illegible] measure as may be necessary to protect [illegible] business public, without, at the same t[illegible] imposing any unnecessary restriction on [illegible] working of what ought to be, and gener[illegible] are, great public conveniences.

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## WRITS AGAINST GOODS AND LAN[illegible]

The case of *The Ontario Bank* v. *Ke[illegible] et al.*, in the Common Pleas, the report [illegible] which will be found in another place, and [illegible] *Ontario Bank* v. *Muirhead*, 24 U. C. Q[illegible]

563, following *Oswald* v. *Rykert*, 22 U. C. Q. B. 363, are practical examples of the inconvenient and unfair working of the law, respecting writs of execution both against lands and against goods. It is remarked upon by the learned judge who delivered the judgment of the court, in the case in the Common Pleas, who, whilst pointing out the evils of the present system, suggested that "It would, perhaps, have been a more convenient method of proceeding on executions to have had the one writ against goods and chattels, and lands and tenements, with a direction to the sheriff to levy upon the goods and chattels, as in *elegits*, in the first place; and if there were no goods, or upon these being exhausted, to levy upon the lands, but not to sell them for twelve months after the seizure."

The subject has already received some attention from our Legislators. Mr. M. C. Cameron last session, introduced a bill which among other things proposes, after repealing section 252 of the C. L. P. Act, to enact that "goods and chattels, and lands and tenements, may be included in the same writ of execution; provided always, that the Sheriff shall not expose any lands or tenements for sale, within less than twelve months from the day on which the writ is delivered to him, nor until the goods and chattels of the execution debtor shall have been first disposed of and exhausted." Some such provision as either of these, which are substantially the same, seems desirable, and we hope that at the close of next session we may find that the necessary amendment in the law has been made.

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## LAW SOCIETY—MICHAELMAS TERM 1865.

We are glad to see that the number of persons willing to sacrifice themselves for the good of their country, by becoming lawyers, has somewhat fallen off this term.

Eighteen gentlemen presented themselves for examination for call to the Bar, of whom the following passed:

T. Boyle, Madden; P. M. Campbell, Toronto; M. Caldwell, London; M. O'Driscoll, Pembroke; E. H. Duggan, Toronto; D. Freeman, Hamilton; C. E. Hamilton, St. Catharines; A. Hoskin, Toronto; J. F. McDonald, Toronto; W. A. Reeve, Napanee; Jas. Robb, Hamilton; R.T. M. Walkem, Kingston; S. White, Windsor.

The papers of Messrs. Reeve and Walkem, particularly the former, were considered so satisfactory that they were not called upon for the oral examination.

Of twenty three students who went up for examination for admission as attorneys, only the following obtained certificates:

Jas. Austin, Toronto; G. A. Consitt, Perth; W. M. Cochrane, Hamilton; P. M. Campbell, Toronto; G. O. Freeman, Hamilton; Alex. Goforth, Welland; James H. Mills, Hamilton; E. G. Malloch, Perth; M. J. Macnamara, Kingston; T. K. Morgan, Barrie; A. Parsons, Ottawa; R. T. M. Walkem, Kingston.

Mr. Walkem also distinguished himself in this examination, obtaining we believe, within 15 marks of the total number he could receive in the three papers. He and Mr. Malloch, whose papers were also very good, received the compliment of being passed without oral examination.

The Law Society scholarship examinations being concluded, were awarded as follows:

The first year to Mr. Charles Moss, who obtained 276 marks out of a maximum of 312, the number necessary to obtain a scholarship being 206. Next to Mr. Moss was Mr. Kerr of Perth, who obtained 254 marks and Mr. Arnoldi, who received 242. Another student competed for this scholarship, but did not come up to 206. The Treasurer, in awarding this scholarship, highly complimented Mr. Kerr and Mr. Arnoldi on their proficiency.

No scholarships were awarded for the second or fourth years, the candidates not having reached the qualifying standard.

The scholarship for the third year, was awarded to Mr. Thomas S. Kennedy B. A., Trin. Col., Toronto. The maximum number was 350, the number necessaay to be rated 233. Of the 350, Mr. Kennedy obtained 292, and Mr. Bell, the only other gentleman who came up to the standard, out of seven in all, who went up for examination, received 233. Mr. Kennedy was only in his first year as a student, but, in consequence of his B. A. degree, he could not compete for the second or third year scholarships; the result of the examination was therefore the more creditable to him.

It is thought that arrangements may shortly be made for a course of lectures on medical jurisprudence, by some competent person. The Benchers have agreed to give the room &c.

if a sufficient class can be made up to defray the expenses of the lecturer.

We may mention for the information of several amongst the students, that we have spoken to those in authority, as to publishing the examination questions, as also the number of marks obtained by the different candidates for call and admission; but it is not thought advisable or judicious, for various sufficient reasons, to publish them.

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Mr. Justice Crompton, who was lately compelled, from ill health, to resign his seat in the Court of Queen's Bench in England, has since died, aged 68. Mr. Lush, Q.C., has been appointed to fill the vacancy. The appointment is said to be an admirable one, having been made, as it ought to have been, solely on account of the high legal attainments of the learned gentleman.

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## SELECTIONS.

### THE CASE OF CONSTANCE KENT AND THE PLEA OF GUILTY.

(*From the Law Magazine and Law Review.*)

The case of Constance Kent, in any view of it, is without parallel in the history of crime. In any view of it—whether of her innocence or of her guilt—it belongs to the history of crime, and in either view, whether she was or was not the criminal, it is a case, not only extraordinary, but utterly without parallel. The more closely it is scrutinised, the more it will appear that the secret of that crime is still is veiled in the darkest mystery; and the case not only extraordinary, but remarkably illustrative of the incurable vice and uselessness of our whole system of criminal procedure. From the first stage to the last, it is downright absurdity, but more especially in the first steps; for, of course, in the detection of crime, especially crime of any mystery and atrocity, time is everything; and it is of the very essence of criminal procedure, that the first steps should be swift, prompt, and keenly intelligent. It is not too much to say, and it has been said on this very subject by able writers, that if intelligent and obvious means were at once employed, hardly any murder could escape detection. In this case, for instance, had the inmates of that house, on the morning of the discovery of the deed, been separated, and separately examined, while, in the meantime, without the delay of an hour, while the inmates were being thus occupied, the premises had been carefully searched, and all this had been done under the guidance of some person acute, intelligent, educated, and acquainted with the manifold motives of human nature, and the artifices and mysteries of crime, there can be no doubt that the mystery would have speedily been solved. As it was, however, what with a blundering coroner, and ignorant policemen, and stupid "detectives," and, above all, delay, the opportunity was lost for discovery, and the case has been left for ever a mystery. We say for ever, for though shallow-minded persons, when Constance made her admission of guilt (not confession, for confession in the proper sense she never made) said the mystery was cleared up, we shall have no difficulty in showing that, on the contrary, it has only left the mystery deeper and darker than ever; and all that is capable of being made clear is that the person who has thus asserted that she did the deed, did not do it. And in this last stage of the case, as in the first, the imperfection of our system of procedure is painfully made manifest; in nothing more than this—the blind confidence with which the so-called confession was received, and the entire absence in our law of any provision for an investigation—either on the part of the magistrates who received it, or of the court which gave effect to it—into its truth and reality. It is strange that it has occurred to no one to compare it with the undoubted facts of the case, and the sworn evidence of witnesses, in order to test its truth. It is unfortunate that the court could not do so at the trial, upon a plea of guilty; and though the magistrates took evidence as to the circumstances of the case, which, as we shall show, are utterly inconsistent with the statement of guilt, they, in the course of their duty, could only commit the girl for trial as she had chosen to say she did it. The learned judge at the trial expressed a wish that the case should be gone into with a a view to test the confession, and see if it had been made from any other motive than a consciousness of guilt; which of itself implied his impression that it might be so, and that the confession might possibly be false.

Persons who are not acquainted with the history of criminal trials may fancy that the confession of a crime is certain to be true, but lawyers know that confessions are often, for some reason or other, untrue. And this even in capital cases, especially where, as in this instance, there is abundant reason to believe that the party making the admission of guilt knew that there was no danger of the capital penalty being inflicted. Persons commit suicide daily, and confession, if death ensue, is but a form and mode of suicide. And if the sacrifice is made in despair on one side, under the pressure of intolerable misery, and from the most powerful motives of affection on the other hand, with a view to save those who have been involved in ruin by some terrible event in which the world has implicated an entire family, the idea of such a sacrifice—under the combined force of the most powerful motives that can influence human nature

—is infinitely more probable than that such a deed should have been done by such a person, and admitted in such a manner; that is, admitted without being confessed. The learned judge himself, with his usual and characteristic accuracy of expression, denoted the distinction. There was no confession, which would be unaccountable if the girl were guilty; for guilt seeks to unburden itself, and enters into detail, and in this instance there were the strongest moral reasons for doing so, in order to clear others who had been suspected and accused. But there was a marked absence of disclosure and detail, a studied adherence to the strictest reticence, an abstinence—evidently designed—from all circumstantial statement of facts which might test the truth of the confession. If the confession were false, this is not easily explainable, but would be precisely what we should expect. A person who had not done the deed could not declare the details, and would avoid attempting to do so, lest the attempt should betray the falsehood. And there never was a case in which details and circumstances were more necessary to clear others who had been suspected, and who had been made the subject of several previous inquiries. How strange that it should not have occurred to others—it evidently had occurred to the learned judge—to bring the confession to the test of a careful comparison with the undoubted facts of the sworn evidence in the case. Let us recall the history of the case, and trace out its broader features.

On Friday, June 30, 1860, the body of the murdered child was found in a privy, with its throat cut from ear to ear, and with a deep stab half through its chest. It is most important in such a case to look closely at what is called the "real" evidence in the case—those circumstances of the *corpus delicti* itself, which cannot deceive. Now in the present case the evidence of this kind was clear, strong, and conclusive as to the weapon used. The surgeon stated that there was a stab which was made by a long pointed knife, such as a dagger or a carving-knife. He came, he said, to that conclusion from the way in which the clothes were cut, "which nothing but a direct point would do." And he added that it would require great force to inflict such a wound. The wound, he said, must have been made stab by a dagger or pointed knife, and formed a made by a long and strong pointed instrument. Besides this, the throat was cut from ear to ear, which of course could have been done by a knife with a point, but the stab, the surgeon was sure, must have been done by such a weapon.

Besides this, the surgeon said that there were strong symptoms of suffocation. There was, he said, a blackened appearance round the mouth, as if something had been pressed tightly against it. It struck him, he said, that there had been strong pressure against the mouth before death; "the tongue, too, was protruded." The appearance, he said, indicated that there had been pressure upon the mouth for a considerable time; to such an extent as to cause the tongue to protrude, and blacken the mouth; and cause suffocation, if not death. The severing of the arteries would have caused the blood to spirt up in a jet, unless death had already taken place. The stab, he was sure, would require a long sharp-pointed instrument, and could not have been caused but by a sharp point. The stab had, he said, penetrated half through the chest.

Next, as to the time of the act. The surgeon stated that when he saw the body at nine o'clock, he thought death had taken place five hours previously, that is, about four in the morning. Allowing for the circumstance that the body was found in a cool place—the vault of a privy—it is more likely that it was a less time than a longer time than that. But taking it at that, or about that time, say between three and four in the morning, here the evidence of the surgeon received a strong confirmation in that of Mrs. Kent, who swore that "in the dim light of the morning," which would be between three and four, she heard a noise as of the drawing-room window opening; which window was found open.

Then as to the condition and circumstances in which the body was found. It was wrapped in a small blanket which had been upon the bed between the counterpane and sheet; and under it was a small piece of flannel; and under that as much as a square yard of some newspaper. Such were the circumstances under which the body was found; and it is obvious that whoever did the deed would be able to account for the weapon with which it was done—the opening of the window—the use of the flannel and the paper, and all the other surrounding circumstances of the case.

It should be borne in mind further, that it was found in the course of the previous inquiries—though utterly forgotten afterwards—that there was access to the nursery from outside the house, through a little spare room adjoining it, and the low roof of an outhouse to which a man could obtain access merely by getting on a wall. It is an illustration of the extreme stupidity which marks our mode of dealing with such cases, that not only has the fact been entirely forgotten, but the contrary of it has been persistently assumed in all the discussions the case has received, and it has been taken as a fact, therefore, that the actual murderer must have been an inmate of the house. We know that a legal gentleman, who, at the time the case occurred, applied his mind to it, and wrote an elaborate letter to the late Home Secretary, Sir G. C. Lewis, about it, came to a different conclusion; and although, of course, there must have been some one in the house aware of the murder—for no rational theory of motive could be started which would not implicate two persons—it is not necessary to assume that the other person was any party to the murder, or even, in a legal sense, privy to it; for it may have been done by one with

the knowledge but without the assent of the other, who may have stood by, under certain circumstances, a shocked and startled witness of the deed—committed on some sudden impulse, from the danger of an alarm. The assumption, therefore, that the actual murderer must have lived in the house (almost invariably made the basis of any theory of the guilt of Constance) is unfounded; and if it be assumed by hypothesis that the actual murderer was not an inmate, then it is of course almost certain that Constance was not implicated at all; for all theories of her guilt—including her own (which if false in any respect is not reliable at all)—make her the sole culprit. It is remarkable that a man actually confessed the perpetration of the crime, in the very mode now suggested as possible—viz., by having the child handed out of the window to him; and he gave a very correct description of the premises, showing that he knew them; which we allude to, not only as showing that those who knew the premises were aware of the possibility of such a mode of committing the deed—but also as illustrating, by what ensued, the importance of sifting a confession.

That confession was sifted and treated by the magistrates as false, and the man was discharged. Assuming that it was false, as there was one false confession of the crime there might be another—the one, indeed, might have suggested the other—and if the one upon investigation was found to be false, perhaps the other might have been equally found false, if equally sifted. That case shows that magistrates are not obliged to commit persons on their own confession, if upon investigation they have reason to believe it false; and we were not quite satisfied with the committal of Constance Kent without a sufficiently stringent enquiry into the truth of her confession, and especially as to its consistency with the sworn evidence given or taken at inquiries, and the undoubted facts in the case. To these we desire to direct attention, not in the least with the view of showing or suggesting who did the deed (for the time for finding out that has long since passed away) but with the view of testing the truth of the admission made by Constance Kent, and illustrating the infirmity of our law, in not admitting of a proper investigation at the trial of the truth of the plea of guilty. We desire, indeed, to direct particular attention to this, that all the real evidence in the case, especially the appearances of suffocation, point clearly to a deed rather sudden than premeditated and prepared; and we particularly point to this, that the confession of Constance Kent, who declares she carried the child down so carefully and gently as not to wake him, is utterly at variance with these clear proofs of violent suffocation.

Next, as to the circumstances which immediately followed the event, the facts are at once proved, beyond a doubt. The very same morning, the surgeon, with the police superintendent examined the nightgown of Constance Kent, which was on her bed, and observed nothing to attract their attention; the murder was early on Saturday morning, and on the Monday morning the clothes were put in a basket, in a lumber room, to which all in the house had access, until the laundress came, which was at mid-day; turning to the evidence of the housemaid, the night-dress Constance had worn the week before, ending on Saturday, was put into that basket, and a second was in wear, which had been aired for the purpose on the Saturday; and a third was taken into wear on the following Saturday, so that, as the girl only had three, the one worn on the night of the murder must have been either the one put into the basket, or the one just taken into wear.

It is clear that the surgeon and superintendent saw both of them, but they observed nothing particular in either; and on the same day, the Saturday, at four in the afternoon, the wife of a policeman came to examine the night-dresses of the young ladies, and among others that of Constance, and found nothing to lead to suspicion, and the one she saw had been worn a week, so that it was the old one which the housemaid swore was put into the basket on Monday morning, the basket being put into the lumber-room till the laundress came for it, during which interval the basket was open to everybody in the house. When the laundress came to examine the basket, she found, as she said, that the nightgown was missing, and it has never been discovered what became of it; but it is obvious that it might have been taken by any one in the house, so that its disappearance proved nothing against any one in particular.

Then as to the piece of flannel found under the body, the policeman's wife, on that very day, the day of the murder, examined and testified that it was a chest protector made out of an old flannel garment, and that she tried it on all the servants, and found that it fitted the nurse exactly, though the nursemaid swore that "it did not belong to the house." There was not a single fact which in any way pointed to Constance, and the incidents of the missing nightgown rather pointed to some one else as having abstracted it to throw the guilt upon her, because as both her nightgowns, the one just taken into wear, and the one out of wear, had been seen and examined by several persons on the day of the murder, she had no reason to abstract it, and any one else might have done so.

When Constance was accused, at the time, even with all the aid of a detective, not one single fact could be proved against her. The fact of the nightgown being missing, as already shown, came to nothing, or rather, went to point to some one else. The fact of a garment having been found downstairs,* came to less

* "In evidence, police-sergeant James Watts said: 'That in consequence of certain information which I received, I proceeded to the house of Mr. Kent, in June, 1850, and made a search. In the course of the search I found in the linen-hol-

than nothing, for it was not proved that it belonged to Constance, or that the blood was not natural, which, indeed, it would appear it was, and this accounts for its never having been seen again after having been shown to a medical man. The fact, indeed, that it was found secreted downstairs, points rather, as does another fact,† not proved in evidence, to the servants.

It is surprising that a person should have supposed for a moment that Constance should have destroyed one bloody garment and secreted another downstairs, in a place where it must have been found. The evidence, indeed, showed that she had not destroyed a nightdress, for the housemaid proved that the one which was missing was the one seen and shown to several persons on the morning of the murder; and the two others were found; and the girl had but three. The detective, whose blundering in the case strongly showed the want of persons of some intellect to undertake such cases, had got an idea into his head, just one of those ideas which ignorant persons take up so readily, and cannot bring to the test of careful and enlarged examination of all the facts. His idea was that the nightdress put into the basket was not the one worn during the bloody deed, but one put into the basket in substitution for it, and withdrawn to put in its place—leaving the absence of a third to be accounted for by a supposed loss by the laundress.

It no doubt would be absurd to suppose that Constance, a sharp, sensible girl, should have put a nightdress which had been bloody, into the basket, or that she should at once raise suspicion against herself by withdrawing one from the basket, the loss of which the laundress was certain to discover and declare—as she did—that very day; and this although several witnesses had seen both dresses and found nothing to observe upon them. Thus she would gratuitously and unnecessarily have exposed herself to a fatal and irremovable suspicion. If her statement is true the "detective" was wrong altogether; for she says the dress put into the basket was the one worn while she did the bloody deed. On the probable truth of this it is enough to observe that it was too absurd even for the detective to suppose; and no one, surely, can believe that, supposing the nightdress had such traces that she should have felt it necessary to withdraw it and incur the certainty of irremovable suspicion, the persons, male and female, who had examined it on the morning of the murder, would not have observed those traces. For the present, however, it is enough to notice that if the confession is true the detective's theory was wrong; and that the undoubted facts in the case are not to be reconciled with either the one or the other. However, there was one fact which had a fatal effect upon the girl—the nightdress, beyond a doubt, was missing. And that fact ruined her. It was a fact which could not, we think, be explained on any credible theory of her *guilt*. But, on the other hand, it could not be explained on any theory of her *innocence*, except upon this, that some one else, implicated in the crime, and an inmate of the house, had withdrawn the dress from the basket, in order to divert suspicion and throw it on Constance; and it is observable that about a week after the murder, the nurse, being then herself under suspicion and surveillance of the police, remarked upon the fact that the nightdress was missing as certain to lead to a disclosure of the guilty party; and went so far, according to two witnesses, as to state that she herself had seen the dress put into the basket, which she at once denied; but they, on their oath, asserted that she had said so, and it was one of the facts given in evidence against her.

This shows that it might have occurred to any inmate who was conscious of guilt or suspicion, to seek to throw the suspicion off in in this way. Such a course has been known to be taken by a person suspected, though not guilty; and, once taken, of course could never be acknowledged; for, on the other hand, it would be deemed, in all likelihood, a fatal proof of guilt. So that the mere fact that the dress was missing proved nothing against the person to whom it belonged, as others in the house had the opportunity of removing it; and on the other hand, of course that person must always remain open to suspicion, unless its removal was brought home to any one else. The act of abstracting the dress, whoever did it, was secret, and no one would be likely to confess what it would be probably fatal to acknowledge. An attempt was made, on the hearing of the case against the nurse, to con-

in the scullery a chemise wrapped up in a thick brown paper I took it into the stable in the yard to examine it, and while so employed, police superintendent Foley came, and I showed it to him. There was blood on it. Mr. Foley took it away, and said he would show it to a medical gentleman. I have not seen it since. The blood was on the lower part of the chemise. There was a good bit of blood about it. The blood was on both the fore and hinder part. I do not think that there was any blood on the garment about the shoulder part. The marks of blood and smears nearly covered the lower part of the dress. They were both before and behind. I found the chemise on the Saturday afternoon about four o'clock.' By Mr. Rodway: 'I don't know, of my own knowledge, whether the chemise was ever shown to a medical man. I have never seen it since.'"

† "There is one fact which has never yet come to light, from first to last, in this case. It will be remembered that the man-servant and boys swore that when they cleaned the knives and forks in the pantry on the morning of the murder, June 30, all the knives were there, and not one was missing. Shortly after the discovery of the murder, the local police, in scrutinising the locality of the pantry, happened to take particular notice of the knife-cleaning machine. They applied a turnscrew to the screws, and found them easily yield. Opened the machine, examined the inside, and a white-handled poultry knife, with spots as of blood clearly visible upon the blade, was discovered hidden there. This circumstance, like that of the stained piece of linen found in the boiler flue—whether important or unimportant we do not say—was kept strictly secret, and it was only by a stratagem that the writer contrived to get an acknowledgment that such a knife, with such stains as described upon the blade, had been found in the knife-cleaning machine. This knife, when last seen, which was about four years ago, was in the possession of the police. Who knows, if this had been produced at the time, what aid it might have rendered as a link in the chain of evidence in the elucidation of the mystery?"—*Western Daily Press.*

nect with the incident in this way, that two witnesses swore, as already stated, that she had herself seen the dress put in the basket, and that being taxed with this she denied it; but that was all that could be proved about it, and the one fact, beyond a doubt, which was fatal to Constance Kent, remained unexplained; viz., that it was *missing*.

(*To be continued.*)

## LAW v. EQUITY.

(*Continued from page 284.*)

A digest of our law is, at the present day, earnestly longed for, so that we need not discuss the degree of its utility. A digest, in the modern sense, implies a consolidation of the whole law into a single mass, and, consequently, an abolition of the technical distinction between law and equity. An amalgamation of these systems, however, neither follows necessarily upon, nor requires a digest or consolidation of the law. All the powers and jurisdiction of the equity judges could be, by a single clause in a statute, transferred to the courts of common law, and be there administered either by means of a distinct procedure of their own, or by the introduction of totally new forms of procedure, which should endeavour to embrace both systems, without the necessity of any previous codification or arrangement.

The infusion of equitable principles into our common law system, attempted by the Common Law Procedure Act, 1854, is very incomplete, and has, besides, worked very unsatisfactorily. Be it remarked that the existing common law procedure is totally unfitted for the purposes of what may be distinguished as administrative equity, and that, in the matter of remedial or auxiliary equity, which, under the Act of 1864 might have been exercised in the shape of injunctions and discovery, the courts at Westminster have refused to grant relief, unless where the right sought to be enforced is established in a manner which would satisfy a Court of Equity *at the Hearing*. There is not, we think, a single case decided under the Common Law Procedure Acts where a party has succeeded in enforcing a right, unless the circumstances proved would in equity, have been a sufficient foundation for a perpetual injunction. The *judicial* discretion of a court of equity has consequently been wholly left out of the Common Law Procedure Acts.

Even prior to the passing of these Acts, however, courts of law enjoyed a certain degree of equitable power, not, indeed, for enforcing rights, so much as for preventing the commission of wrongs. The common law *jurisdiction* in cases of fraud, for instance, appears to us to be entirely co-extensive and co-equal with the like power of the Court of Chancery, though from an early slavery to the trammels of pleading, the actual course of the courts was more restricted and technical. Some writers on equity jurisprudence, indeed have asserted the contrary, and considered that the jurisdiction as well as the remedy to be had in courts of law in cases of fraud is less extensive than in the analogous domain of chancery. These writers have indeed apparently on their side the powerful authority of Vice-Chancellor Kindersley, who, in *Stewart* v. *The Great Western Railway Company*, 13 W. R. 886, expressed himself in favour of the view that the equitable jurisdiction is the more extensive. But this case, though at first sight well adapted to raise that question, did not really decide anything on this point. A tradesman and his wife were passengers by an excursion train, which, owing to alleged negligence by the company's servants, met with an accident, whereby the plaintiffs received serious injury, and were obliged to call in a Mr. Woodward, a surgeon, and medical officers of the company. The plaintiff, when asked by Mr. Woodward what compensation he would require from the company, demanded only £50. Mr. Woodward, who, it appears, was in the company's interest, recommended him to accept £15, and the medical officers of the company earnestly urged him to do so, adding that he would be well immediately, while Mr. Woodward affirmed (contrary to the fact), that the plaintiff's wife's leg was not broken. The plaintiff said that he was in no hurry to settle with the defendants, but finally accepted £15, and gave a receipt for that sum as compensation in full for all damages. He subsequently, however, brought an action against the company for £1,700, to which they pleaded "not guilty" and set up the receipt. The plaintiff then filed a bill alleging fraud, and seeking a declaration that the payment was not under the circumstances a full compensation. An injunction was also sought to restrain the defendants from setting up the receipt. The Vice-Chancellor overruled a general demurrer to the bill for want of equity, being of opinion that the fraud alleged by the bill was such that a court of a law could not take cognizance thereof.

"It would be very difficult," his Honour observed, "to give a definition of what constitutes legal or equitable fraud, but I am of opinion that the facts which are alleged, if proved, are not such as to constitute that sort of fraud which a court of law would take cognizance of." That a definition of fraud in general is very hard to be given we admit, but there appears to be no greater difficulty in defining legal than there is in defining equitable fraud. The difficulty, such as it is, is common to both law and equity, and results from the fact that *moral* fraud must be proved to establish a case in either court. In *Cornfoot* v. *Fowke*, 6 M. & W. 358, for instance, the owner of a house, who knew of a defect in it, employed an agent for sale, who was ignorant of the defect. The purchaser sued as for a fraudulent *scienter* and concealment, but the

court held that as the moral fraud of the owner, and the legal fraud of the agent, did not concur in the same person, no case of fraud could be proved against either. The ruling in this, although it underwent some vicissitudes, is, we believe, still law.

His Honour indeed seems to think that intentional moral fraud on the part of the defendants is not necessary to establish a case of fraud in equity. "It is perfectly clear," he continues, "that a body corporate or the directors can know nothing more about such a fraud as this than any stranger, and, therefore, it would be impossible to prove the fraud committed by the company. The fraud taken cognizance of by a court of equity is made up of all the circumstances of the case, the position of the parties, that they have been imposed upon, have been *inopes consilii*, and, being in a state of bodily, were, consequently, in a state of mental, weakness." All these circumstances, however, are undoubtedly such as would go to establish a fraud at law. The distinction is not one inherent in the jurisdiction, but in the nature of the proof required. Vice-Chancellor Wood laid down, in *Benham* v. *Keane*, that to take advantage knowingly of the fraud of another was to be a *particeps criminis*, at least to the extent of being prevented from taking any advantage of that fraud; and this is the true equitable principle which the courts of law, not from defect of jurisdiction to determine it, but from their nature of this procedure, refuse to recognise.

The Vice-Chancellor was, under any circumstances, bound to overrule the demurrer, because the right of the plaintiff to choose his tribunal, where the jurisdiction is concurrent, has not been interfered with by the late Acts: *Evans* v. *Bremridge*, 2 K. & J. 174. We respectfully dissent, however, from his Honour's opinion, that the jurisdiction of a court of law would be inadequate to reach cases of fraud merely on account of their degree of complexity. The general impression, however, certainly is that a court of law can only take cognizance of a fraud if it be clear; just as it can grant relief on an "equity" under the Common Law Procedure Acts, only if it be indisputable. If we are right in this, it follows that it is unnecessary, and would be futile, by statute to confer upon courts of law an unlimited jurisdiction in cases of fraud, because, as we contend, they enjoy already such power, and are only prevented from exercising it by the fact that they have no procedure fitted for the purpose. To propose to alter their procedure is to re-establish courts of equity under common law judges, nothing more; and may be possibly productive of no greater harm than the loss of the advantage arising from division of labour.

The idea of allowing a plaintiff to *originate* a suit at law upon grounds now cognizable only by a Court of Equity, aimed at by Lord Campbell's Law and Equity Bill of 1860, arose simply from a misconcepti n of the object of conferring equitable jurisdiction on common law courts. On this point we beg to refer our readers to the remarks made upon that bill at the time.* A thorough fusion of law and equity is, doubtless, the necessary result of present tendencies and past legislation, but it is mere confusion to suppose that this implies a simple transfer of all litigation to the common law courts at present in existence.

The consequences of this simplification of the law, if carried out fairly, as we think it ought to be, will in our opinion, be more beneficial than otherwise to the profession.

Let it be an understood thing that every plaintiff who *commences* his proceedings in the right court, be it Queen's Bench, Chancery, Probate, or what not, will be able, no matter what new matter may arise in the course of the proceedings, to have his claim finally adjudicated upon in and by that court, and all that can rationally be desired in the way of fusion will have been accomplished. A hundred years ago the Courts might have done this of their own mere motion, at the expense, at most, of a legal fiction or two; *now* a statute is essential for the purpose, but if it would only be general enough and avoid that pernicious meddling and muddling in details so characteristic of modern English legislation, a very short Act might set at rest this somewhat vexed question.—*Solicitors' Journal.*

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## THE QUAKER AND THE JUDGE.

Upon the jury entering the box at the late Liverpool assizes one morning, one of the number, who gave his name as Josiah Carson, and was a member of the Society of Friends, kept on his hat. Mr. Baron Bramwell, observing it, requested him to uncover. The juryman—"Conscience compels me to keep it on." The Judge.—"Conscience no more compels you to keep your hat on than it does your shoes. You must have respect for others. I will fine you £10 if you don't take off your hat.". The juryman—"It is a reverence for the Almighty which compels me to keep it on." The Judge.—"Don't be nonsensical. Your reason is discreditable to common sense." The juryman still refusing to uncover, the Judge said,—"I warn you that I will fine you £10 if you do not take off your hat." The juryman.—"I cannot do so." The Judge.—"Then I fine you £10, and leave the box. Any person with such nonsense in his head is not fit to sit upon a jury." The juryman having left the court, the Judge said—"I shall call upon him again to-morrow, and if he still persist in his nonsense I shall fine him again."—*Express.*

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The Yelverton marriage case is likely to come before the public again on the meeting of Parliament—an appeal to the House of Lords having been duly lodged on behalf of Miss L. against the judgment of the Court of Session.

* 4 Sol. Jour. 657.

# UPPER CANADA REPORTS.

## QUEEN'S BENCH.

(*Reported by* C. Robinson, Esq., Q.C., *Reporter to the Court.*)

### Gustavus Dundas v. John Johnston and John Wilson.

*Ejectment—Title by possession—Possession of part only—Effect of—Competency of witness—New trial refused.*

Remarks upon the possession necessary to obtain a title as against the true owner, and the effect of such possession when extending only to part of a lot.

It must depend upon the circumstances of each case whether the jury may not, as against the legal title, properly infer possession of the whole Land covered by such title, though the occupation by open acts of ownership, such as clearing, fencing and cultivating, has been limited to a portion; and *held*, that in this case there was evidence legally sufficient to warrant such inference.

*Semble*, that a "squatter" will acquire title as against the real owner only to the part he has actually occupied, or at least over which he has exercised continuous and open notorious acts of ownership, and not mere desultory acts of trespass, in respect of which the true owner could not maintain ejectment against the trespasser as the person in possession.

A. being sued in ejectment, suffered judgment by default for want of appearance, and B was admitted to defend as landlord. *Held*, that A. was not a competent witness, but that, as the verdict was warranted by the other testimony, his reception was no ground for interference.

[Q. B., T. T., 1865.]

Ejectment for the east half of lot number ten, in the tenth concession of North Monaghan. The writ was addressed only to the defendant Johnston. Wilson was admitted to defend as landlord by a judge's order, and appeared for the whole. Johnston entered no appearance, "whereupon the said Gustavus Dundas ought to recover against him."

The trial took place at Peterborough, in May last, before Adam Wilson, J.

It appeared that a patent from the Crown, dated the 28th of November, 1838, issued, granting the premises in fee to the plaintiff. He also proved the execution of a deed, dated the 1st of February, 1860, from himself to one Edward Chamberlain, of the premises, for an expressed consideration of £150. A witness swore that about forty years ago, the plaintiff, who represented himself to be a discharged soldier, offered to sell him his right to 100 acres of land, and that the witness accepted the offer, and let the plaintiff have a heifer for it, and got a writing from the plaintiff, which, in moving house many years ago, he lost. He said the meaning of the writing was to secure the witness a right to the land which the plaintiff was entitled to get from the Government. The plaintiff also gave him the location ticket for the 100 acres, being No. 10, in the 10th concession of Monaghan, now North Monaghan. About two years afterwards defendant Wilson bought this right from the witness. The location was subject to settlement duties, and Wilson performed them. The Crown patent was taken out, and the witness believed that Wilson brought it to him to keep until he (Wilson) should pay the witness what he had agreed to pay. He made the payment, and the witness gave up the patent to Wilson.

It was proved that Wilson had a house on the 100 acres adjoining these premises, and cleared from 20 to 30 acres of the premises, a considerable portion of the 100 acres being drowned land, which apparently could not be cultivated.

About the year 1835 the plaintiff asked another of the witnesses for the defence if he knew the lot on which Wilson was living, and said that he had sold that lot. The evidence shewed that Wilson had by himself or his tenants used the cleared land ever since; the uncleared portion had never been fenced in. Evidence was given that the taxes according to the former Treasurer's books had been paid, and the present Treasurer proved that defendant Wilson had paid them in 1846, or for some years afterwards.

The defendant also called John Johnston as a witness, who was objected to, as being the defendant named in the writ of summons. It was answered that he had not appeared to defend, and that judgment was signed against him. The learned judge received his testimony. The most material statement he made was, that the plaintiff, who lived within two miles of these premises, told him that he owned these hundred acres at one time and had sold them.

The learned judge left to the jury whether the plaintiff had knowledge of Wilson being in possession of this land for a period of twenty years or more before action brought, stating that the possession of a part of the 100 acres might import possession of the whole, depending upon circumstances: that Wilson took possession as a purchaser of the whole, according to the evidence, which also shewed that nearly all of the 100 acres which remained uncleared was swampy and not very fit for profitable cultivation, and that the taxes for the whole had been paid.

Exception was taken to that portion of the charge relative to possession of part affording evidence of possession of the whole. The jury found for the defendant.

In Easter Term *C. S Patterson* obtained a rule, calling on the defendant to shew cause why there should not be a new trial, on the ground of the improper reception of the evidence of Johnston, and for misdirection, in ruling that the evidence of the defendant's possession was sufficient without shewing that such possession was continuous, and in ruling that "there was sufficient evidence of the possession of the wild land which the defendant did not occupy;" and on the law and evidence, the possession on which the defendant relied not having been proved. He cited Tay. Ev. 4th ed. sec. 1662.

*S. Richards*, Q.C., shewed cause during this term, and cited *Doe dem. Lord Teynham* v. *Tyler*, 6 Bing. 561; *Hughes* v. *Hughes*, 15 M. & W. 701; *La Frombois* v. *Jackson*, 8 Cowen, 589; *Calk* v. *Lynn's Heirs*, 1 Marshall, 346; *Jackson dem. Hasbrouck* v. *Vermilyea*, 6 Cowen, 678; *Farley* v *Lenox*, 8 Serg. & Rawle, 392; *Hunter* v. *Farr*, 28 U. C. Q. B. 324.

Draper, C. J., delivered the judgment of the court.

The question of title by possession without paper title as against a paper title, often presents peculiar features in this country, and is not always a matter of easy solution. Land is generally divided by the Government surveyors into uniform lots in each township, except where the irregular formation of the ground, owing to lake

or river frontage or other causes, renders this impossible, and then there are broken lots. The grants from the Crown are also very frequently for less than the lots as surveyed, sometimes, as in the present case, for a half lot, sometimes for a quarter lot, and sometimes a certain number of acres, part of a lot, is granted. As a rule these grants are of land in the natural state, not cleared or improved; at least such is generally the assumed condition when the Crown first agrees to dispose of it to individuals. Even where the grants were preceded by mere locations, subject to the performance of settlement duties, it is notorious that these duties were oftentimes not made at all or made in a very perfunctory manner, and no part of the land was in fact either cleared, fenced or settled upon, and notwithstanding the previous condition to perform such duties the grantee had not, in the language of the 3rd section of Con. Stat. U. C. ch. 88, "taken actual possession by residing upon or cultivating some portion thereof."

When therefore a person without any title, or without any real or *bonâ fide* claim of title, (though erroneous) entered upon any such lot, clearing and fencing only a portion thereof, I do not understand upon what principle this wrong doer can be deemed to have taken and to be in possession of the whole of such lot,—for example, of 200 acres, if the lot was originally surveyed to contain that quantity, or of the half or quarter lot, if such had been the division by the original survey; or that his cultivation and fencing of a small part puts him into possession of as much (be it the whole or fractional part of a lot) as the proprietor of the part trespassed upon owns. In cases of what is well understood in the country by the term "Squatters," I have always thought, that as against the real owner they acquire title by twenty years occupation of no more land than they actually have occupied, or at least over which they have exercised continuous and open notorious acts of ownership, and not mere desultory acts of trespass, in respect of which the true owner could not maintain ejectment against the trespasser as the person in possession.

We agree with the learned judge who tried this cause, that it must depend upon the circumstances of each case whether the jury may not, as against the person having the legal title, properly infer the possession of the whole land covered by such title in favour of an actual occupant, though his occupation by open acts of ownership, such as clearing, fencing and cultivating, has been limited to a portion less than the whole. And we think evidence such as was given in this case must be submitted to the jury as legally sufficient to warrant such an inference; and no question upon the evidence, beyond the true character and nature of the possession in point of extent, has been raised.

Upon the question of the competency of the defendant Johnston we are not able to concur in the ruling at the trial. He is tenant in possession of the premises under Wilson, who as landlord is admitted to defend. As such tenant he comes within section 5, of the Evidence Act, (Con. Stat. U. C. ch. 32,) which provides that the previous enactment, that interest shall not disqualify, shall not render competent or authorize or permit "any claimant or tenant of premises sought to be recovered in ejectment" to be called as a witness. His not appearing to defend does not make him the less a tenant of the premises, having a direct interest to prevent a change of possession, and not rendered competent by the act to support that interest by his testimony; but we are of opinion that without his testimony the verdict ought to have been as it was, and we are glad to find in the case of *Doe* v. *Tyler*, 6 Bing, 561, which is recognised in *Hughes* v. *Hughes*, 15 M. & W. 701, an authority for upholding the verdict.

We are of opinion this rule should be discharged.

Rule discharged.

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## BATES V. THE GREAT WESTERN RAILWAY CO.

*Common carriers—Special conditions.*

Action against defendants as common carriers for delay in carrying goods.—*Plea*, setting up special conditions, on which the goods were received, exempting defendants from liability, *Held*, good on demurrer.

Remarks as to the necessity and justice of legislative redress in such cases.

[Q. B., T. T., 1865]

The declaration stated that the defendants, being common carriers by their railway, received from the plaintiff certain cattle to be carried from Ingersoll to Toronto; and the breach of duty alleged was that they negligently and improperly detained the cattle at Ingersoll, and kept them in an open and exposed place, owing to which two of them died on the journey, and that by the unreasonable delay in the carriage and delivery of the others the plaintiff lost a market, &c.

*Plea*, that the said oxen and cows in the declaration mentioned were delivered by the plaintiff to and accepted and received by the defendants to be carried and conveyed under a special contract, and subject to the following conditions:—

That the plaintiff undertook all risk of loss, injury, damage and other contingencies in loading, unloading, conveyance and otherwise, whether arising from the negligence, default or misconduct, criminal or otherwise, on the part of defendants or their servants; and that they, the defendants, did not undertake to forward the animals by any particular train, or at any specified hour, neither were the defendants responsible for the delivery of the animals within any certain time, or for any particular market.

And the defendants further say, that the loss and injury sustained by the plaintiff in respect of the said oxen and cows in the declaration metioned, as well by the keeping and retaining of the same at the said Ingersoll station as by the delay in the conveying and delivery thereof, were a loss and injury within the true intent and meaning of the said conditions, and was and is part of the loss or damage so agreed to be borne by the plaintiff as aforesaid, and not any other loss or damage.

The plaintiff took issue on so much of the plea as relates to the said two cattle alleged in the declaration to have died in consequence of the negligence of the defendants. And as to the residue, he demurred, on the ground that the

plea does not answer the breach of duty alleged —namely, unreasonable delay in carrying; and notwithstanding anything in said contract the defendants would be bound to carry within a reasonable time.

*S. Richards*, Q.B., for the demurrer.

*M. C. Cameron*, Q.C., contra, cited *White* v. *The Great Western R. W. Co.*, 2 C. B. N. S. 7; *Latham* v. *Rutley*, 2 B. & C. 20; *Hamilton* v. *Grand Trunk R. W. Co.*, 23 U. C. Q. B. 600.

Draper, C. J. delivered the judgment of the court.

In the existing state of our law we are of opinion that the plea demurred to is good. The declaration is framed upon the common law liability of the defendants as common carriers, and the plea sets up that they did not receive the cattle under such liability, but under a special contract which is set out. It is too late to argue that the parties could not lawfully enter into such a contract. Having entered into it their rights and liabilities are to be ascertained by its terms, and not by the common law. We have no such enactment as the 17 & 18 Vic. ch. 31, sec. 8, which submits the question whether the conditions imposed by the Railway Company are reasonable or otherwise to the decision of the court or judge before whom any question relative thereto shall be tried.

This case as well as that of *Hamilton* v. *The Grand Trunk Railway Company* 23 U. C. Q. B. 600 illustrates the necessity and justice of legislative redress. The recent case of *Allday* v. *The Great Western Railway Company* 11 Jur. N. S. 12 shews the value of the English act. The court in that case held that a condition limiting the defendants' responsiblity, very analogous to the present case, was unreasonable, and gave judgment for the plaintiff on the face of it.

But in the absence of any such authority we must decide in the defendants' favour on this demurrer.

Judgment for defendants on demurrer.

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Michael D'Arcy v. Stephen White and James Wilson.

*Ejectment—Judgment by default—Costs.*

An ejectment summons having been served on A. and B., A only defended, and B. allowed judgment to go by default. The plaintiff obtained a verdict and issued a *hab. fac.* and *fi. fa.* for costs against both, whereupon B. moved to set it aside as against himself, or to have his name struck out of the proceedings; but

*Held*, that the plaintiff was right, for, as to the *hab. fac.*, if B claimed no interest in the land, and was not in possession, he should have applied, on receiving the summons, to have his name struck out; and as to the *fi. fa.* for costs, he was liable, for although if sole defendant he would not have been, yet when there are two persons in possession and one appears, the judgment is suspended till the trial of the issue, if the latter succeeds it enures to the benefit of the other, and if he fails both are liable for the whole costs, (as in an action for damages) of which there can be only one taxation.

[Q. B., T. T., 1865.]

The plaintiff, on the eleventh day of July, 1864, issued an ejectment summons against both the defendants, to recover possession of part of lot number twenty in the fifth concession of the township of North Burgess, specially described. On the 22nd of August. 1864, James White appeared by attorney, and defended for the whole premises, and no appearance was entered or defence made by the defendant Stephen White, and an entry was made on the roll, that the plaintiff ought to recover against him the possession of the said land, but proceedings against him were stayed until the determination of the issue between the plaintiff and James White.

That issue was tried on the 13th of October, 1864, when the jury rendered a verdict for the plaintiff, on which judgment was entered on the 26th of April, 1865, that the plaintiff recover possession of the land in the writ of summons mentioned, and $166 84 for costs of suit.

On the same 26th of April, 1865, the plaintiff issued a writ, reciting that he had lately recovered possession of the premises mentioned in the writ of summons in an action of ejectment, at his suit, against Stephen White and James White. commanding the sheriff to cause the plaintiff to have possession of the said land and premises, with the appurtenances, and further commanding the sheriff of the goods and chattels of the said Stephen and James White that he should cause to be made $166 84, which the plaintiff lately recovered against them for his costs of suit.

And Stephen White obtained a rule calling on the plaintiff to shew cause why the writ of *habere facias possessionem* and *fieri facias* against goods should not be set aside as against him, on the ground that the judgment entered only awarded possession as against him, and that he had not appeared and defended; or why the *fi. fa.* against goods should not be set aside as against Stephen White; or why the judgment should not be set aside as against Stephen White, for directing generally that the plaintiff should recover possession and costs, not saying of whom the costs should be levied, whereas it should have directed that they should be recovered of the defendant James White, the defendant Stephen not having appeared and so not being liable for for costs; and that no proper interlocutory judgment was signed against Stephen; or why the judgment should not be amended, so as to direct definitely against whom execution for costs should be directed; or why Stephen White should not be relieved from being a defendant, and have his name struck out of the proceedings, on the ground that at the commencement of this suit he had no interest in the premises, and was not in possession, and did not appear and defend; or why all proceedings to recover costs under the judgment and writ should not be stayed, on such terms as to costs as the court might direct.

In the affidavit filed in this case, it was stated that a seizure of goods of Stephen White had been made under this execution, and that no action for mesne profits had been brought against him. It was also sworn on his behalf that on the 23rd of April, 1864, he executed a quit-claim deed to his son, the other defendant, of the premises mentioned in the writ of summons, the consideration being a debt of £25 due by the father to the son for working on his farm, and five shillings.

Stephen White swore, among other things, that he had never used or occupied any part of the land sued for, except about fifteen acres, which (with other land) he conveyed, on the 23rd of April, to his son James, which conveyance was made in pursuance of an agreement

made between them, that James should come and work with Stephen for a year, which he did, and thereupon Stephen conveyed to him; that the land was poor, and not worth more than a reasonable compensation for James's service. He denied that he was concerned in or privy to the defence. And after the sale to James he swore he did not occupy or use the land in any way, other than for the pasturage of some young cattle for, which he paid James: that he never was notified by the plaintiff of his title to the land: that he attended the trial of this cause merely from curiosity, and not from any interest he had himself in the matter, and as he had not for years been able to work, he lost nothing by his attendance at court.

On the other hand, the plaintiff swore, that after he had purchased these premises he found Stephen White in possession, and applied to him to him to give them up, but he did not do so, but he continued to possess the same till he was put out by the sheriff, but that he pressed the plaintiff to sell him this land: that the defendant James was living with his father, and had no separate dwelling, and was not more than tweny-two or twenty-three years of age: that, notwtithstanding the transfer, Stephen White during the summer of 1864 and the spring of 1865, used the land, and pastured his cattle thereon, as he formerly used to do, and removed his cattle therefrom two or three days before the plaintiff was put into possession. And the statement that Stephen was for several years in possession of these premises until ejected was confirmed by another deponent, who also swore that he was satisfied James White had no property.

*Robert A. Harrison* shewed cause, citing *Roots* v. *Farniscott*, 2 U.C.P.R. 239; *Harper* v. *Lowndes*, 15 U. C. Q. B. 430; *Haskins* v. *Cannon et al*, 2 U.C.P.R. 334; *Wilkinson* v. *Kirby*, 15 C.B. 430; *Anstey* v. *Edwards*, 16 C. B. 212; *Hutchinson* v. *Greenwood*, 4 E. & B. 324; *Bleecker* v. *Campbell*, 4 U. C. L. J. 136; Consol. Stat. U. C. ch. 27, secs. 16, 26.

*Kingsmill*, contra, cited Cole on Ejectment, 181; *White* v. *Cochlin*, 2 U.C.P.R. 249; *Mobbs* v. *Vanderbrande*, 9 L. T. Rep. N. S. 761; *Doe dem. Wright* v. *Smith*, 8 Dowl. 517.

Draper, C. J., delivered the judgment of the court.

We think upon Stephen White's own shewing, that he pastured his cattle on this land, on which it does not appear there was any dwelling house or building, the plaintiff had reasonable ground for making him a defendant, as well as the son James. If Stephen had immediately on being served with the ejectment summons made oath that he was not in possession, and claimed no interest in the land at the time of the service, or perhaps at the date of the summons, and this statement was not rebutted, he might have had the service on himself set aside and his name struck out of the writ upon proper terms. But letting judgment go by default, which is the effect of not appearing, must be considered as an admission that he was in possession, for such judgment is a sufficient foundation for a writ to put the plaintiff into possession. He now, among other things, applies for the relief, but I think for this purpose he comes altogether too late. The question is then reduced to his liability to costs.

Although if Stephen had been sole defendant the plaintiff could have had no judgment or execution against him for costs, yet we apprehend that when there are two persons in possession and both are sued, if the plaintiff fails in proving his case against one who defends, he cannot get possession against the other who does not appear to the writ. The judgment of the court is suspended until the issue be tried; and if the defendant who appears is successful, it in effect enures to the benefit of the other. There can only be one taxation of costs where the plaintiff succeeds against all the parties he sues. In an action for damages, if one defendant suffers judgment by default and the other pleads to issue, and the jury find for the plaintiff, there is one entry of judgment for the same costs and damages against both, though the plaintiff's costs must be materially increased by having to go down to trial, which only was made necessary by the act of one defendant.

No authority has been cited which would afford even a pretext for holding that there could be a severance of the taxation of costs in a case like the present, and the analogy of other actions is against such a practice.

The Ejectment Act does not provide for awarding costs when there is only a judgment by default, but where there is a trial it expressly authorizes costs to be recovered; and, as it must be assumed the defendants are jointly in possession, the recovery by verdict against one will, we apprehend, draw with it all the consequences as regards the other.

We think, therefore, this rule should be discharged.

Rule discharged.

## COMMON PLEAS.

(*Reported by* S. J. Vankoughnet, Esq., M.A., *Barrister-at-Law, Reporter to the Court.*)

### The Ontario Bank v. Kerby et al.

*Return of nulla bona to unexecuted fi. fa.—Irregularity—Consent—Concurrent writs against lands and goods—Abandonment of writs against goods—Validity of writs against lands.*

Plaintiffs issued *fi. fas.* goods, and on the same day placed them in the hands of the Sheriffs of different counties. Within three weeks the writs were, at the request of the plaintiffs' attorney, and *with the consent of* H., one of the defendants, returned *nulla bona*, the other defendant, as it was believed having no goods, and the goods of H. being claimed by another in privity with him. On the return of these writs, *fi. fa.* lands and *alias fi. fa.* goods were on the same day issued and placed in the Sheriffs' hands. Subsequently the *alias fi. fas.* goods were withdrawn, the *fi. fas.* lands being left in the Sheriffs' hands.

*Held*, that although the same rule applies in the case of two defendants, as in the case of one, that the goods (of both) must be exhausted before the lands are resorted to, and each has, therefore, as great an interest in the due execution of a writ against the goods of his co-defendant, as against his own, before the lands are touched; yet, in this case, H. could not, by reason of his consent thereto, complain of the return of *nulla bona* as to himself; nor could he complain of the same return as to his co-defendant, because the latter had no goods which could apply to the writs; while the latter could not object to the return as to H., because, it was alleged, the goods of H. were claimed by another under a title from him, and it was not reasonable that the plaintiffs should contest this claim, particularly as the property appeared to be small, when

there was a probability of realizing their claims by a sale of the lands after the expiration of the usual time.

*Held*, also, sustaining *Oswald* v. *Rykert*, 22 U. C. Q. B. 306, that the issuing of the *fi. fas.* lands and *alias fi. fas.* goods concurrently was objectionable; but that the latter, not having been acted on, could be abandoned, and the *fi. fas.* lands retained.

A return of *nulla bona*, where there are goods, is only an irregularity to be excepted to by the defendant, if the plaintiff is abusing the process of the court by proceeding against the lands before having exhausted the goods.

*Quære*, whether the heir, devisee, or other claimant under a deceased debtor, or any person to be prejudiced thereby, may not justly complain, if a wrongful or collusive return of *nulla bona* be made, while there is a sufficiency of goods, and the debtor's lands be seized to satisfy the debt.

Observations on the inconvenience of the procedure here, by two writs of execution, in order to reach lands, and probable intention of 5 Geo. II. ch. 7, with reference thereto. [C. P., T. T., 29 Vic.]

In Easter Term last, *S. B. Freeman*, Q C., on behalf of the Bank of British North America and the defendant James Hamilton, the application being made in three suits between the same parties, obtained a rule in the Practice Court, calling on the plaintiff to shew cause in this court, why the respective writs of *fieri facias* against goods, and the respective writs of *fieri facias* against lands in the hands of the Sheriffs of the counties of Wentworth, Grey and Welland, and of the United Counties of Huron and Bruce, in the above suits respectively, should not be set aside on the grounds, as to the writs against lands, that no writs of *fieri facias* against goods had been taken out in the respective suits and delivered to the said Sheriffs, or to the Sheriffs of any other counties, to be executed; or had been in any such Sheriff's hands to be executed and then returned according to law, before the writs against the lands of the defendants had been issued; and, also, as to all of the said writs, that the writs against the goods and lands of the defendants in the said suits respectively had been issued at the same time, and placed in the respective Sheriffs' hands to be executed, and where then being executed concurrently; and, also, on the ground that the return of *nulla bona* to the writs against goods in the above suits had been collusively, illegally, and fraudulently obtained for the purpose of enabling the said plaintiffs to obtain a fraudulent preference and priority over the other creditors; or why some of the said writs should not be set aside on the grounds aforesaid, and on grounds disclosed in affidavits filed.

The rule was obtained on a memorandum, which stated the following facts:

The plaintiffs have five judgments against these defendants, one of the judgments being against one Samuel Overfield jointly with the defendants. Three of the cases were in this court and two in the Queen's Bench. In the memorandum filed, the suits were numbered; Nos. 1 and 2 being the same as Nos. 1 and 2 at the head of this application, Nos. 3 and 4 being Queen's Bench cases. and No. 5 being the same as No. 3 in this application.

The table below will explain the different kinds of writs that were issued, their delivery to or return by the Sheriffs, and the different dates that are material. All of these writs were directed to the Sheriff of Wentworth.

1. C. P.—*fi. fa.* goods—dated and received by Sheriff 5th April, 1865—returned *nulla bona* 22nd April, 1865.
1. C. P.—*fi. fa.* lands—dated 22nd and received by Sheriff the 24th of April, 1865.
   *al. fi. fa.* goods—dated 22nd and received by Sheriff the 25th of April, 1866.
2. C. P.—*fi. fa.* goods—dated and received by Sheriff 5th April, 1865—returned *nulla bona* 22nd April, 1865.
   *fi. fa.* lands—dated 22nd and received by Sheriff 24th April, 1865.
   *al. fi. fa.* goods—dated 22nd and received by Sheriff 25th April, 1865.
3. Q. B.—*fi. fa.* goods—dated and received by Sheriff 10th April, 1865—returned *nulla bona* 22nd April, 1865.
   *fi. fa.* lands—dated 22nd and received by Sheriff 24th April, 1865.
   *al. fi. fa.* goods—dated 22nd and received by Sheriff 25th April, 1865.
4. Q. B.—*fi. fa.* goods—dated and received by Sheriff 15th April, 1865—returned *nulla bona* 22nd April, 1865.
   *fi. fa.* lands—dated 22nd and received by Sheriff 24th April, 1865.
   *al. fi. fa* goods—dated 22nd and received by Sheriff 25th April, 1865.
5. C. P.—*fi. fa.* goods—dated and received by Sheriff 25th April, 1865—returned by Sheriff *nulla bona* 22nd April, 1865.
   *fi. fa.* lands—dated 22nd and received by Sheriff 24th April, 1865.
   *al. fi. fa.* goods—dated 22nd and received by Sheriff 25th April, 1865.

The same attornies were the attornies for the plaintiffs in each case.

The returns of *nulla bona* were made at the request of the plaintiffs' attornies, and by the consent of James Hamilton, but not with the consent of the other defendant or defendants. When such returns were made James Hamilton had goods liable to seizure in execution in the county of Wentworth, and there was no execution against him excepting in these suits. At this time Kerby had goods in Wentworth under execution or prior writs, which goods were sold on the 18th of May, 1865, and just satisfied such prior writs.

In the third suit in the memorandum, which is in the Queen's Bench, there was, when the above returns were made, a concurrent *fi. fa.* against goods in the hands of the Sheriff of Brant, upon which, on the 10th of May last, he returned, "made $104 90 of the goods of one Muirhead," one of the defendants of that case.

Upon each of the writs of execution against goods, in the cases in this court, there was endorsed a *præcipe*, dated the 22nd April, 1865, for the writs against lands and goods in each case as before mentioned, and for a writ in each case against lands to the Sheriff of Welland, and another to the Sheriff of Huron and Bruce. On the 24th of April, 1865, a writ against lands was, also, issued in each case to the Sheriff of Grey; and all such writs were issued, and, as it is believed, were delivered to the respective Sheriffs, to be executed.

The Sheriff of Wentworth seized, as the property of the defendant Hamilton, certain shares in the stock of the Great Western Railway Company, and in the stock of the Canada Life Assurance Company.

By an indenture, dated the 7th of May, 1865, James Hamilton conveyed to Thomas Paton, General Manager of the Bank of British North America, lands of the said defendant in Wentworth, Welland, Grey, Bruce and Wellington, and also a part of his personal estate by way of mortgage, to secure payment to the said Bank and to the Ontario Bank, the present plaintiffs, ratably and proportionably, according to the debts which he owed to them, the Bank of British North America about $11,100, and the plaintiffs about $11,200.

An affidavit was filed by the plaintiffs' attorney, on the part of the plaintiffs, which stated that shortly after the original writs against goods had been given to the Sheriff, he discovered there was no prospect of the Sheriff making the amount of the executions out of the goods and chattels of the defendants, in consequence of there being then, as he believed, other executions in the Sheriff's hands more than sufficient to cover all the goods of Kerby, and the said Hamilton's personal property, which might have sold for about two or three hundred dollars, being in great part claimed as belonging to his daughter, Mrs. Racey; that therefore the Sheriff was requested to return the writs *nulla bona*, which he did after the consent of Hamilton was given; that he believed the defendants were not possessed of any goods except in Wentworth; that on the 19th of May last he received from Messrs. Freeman & Craigie the latter which was annexed to the affidavit, and on the morning of the 22nd of May he attended at their office, and told Mr. Craigie he was then on his way to the Sheriff's office to withdraw the *alias* writs against goods, in the suits in this court, and on the same day he notified Mr. Craigie of his having done so.

During the present term *Moss* shewed cause.

The law does not compel a plaintiff to wait until the expiry of his writ against goods, when there is a certainty that there will be no goods to answer it, or that there will be goods only to a small value to be applied to it: if this were so, the result would be that subsequent creditors would, by getting a return of no goods, gain the priority, as to the lands, over the earliest creditors: *Doe Spafford* v. *Brown*, 3 O. S. 92.

The plaintiffs had the right, after issuing the concurrent writs against goods and lands, to elect which of them they would continue: they could not both be void.

*Freeman*, Q. C., contra.—The plaintiffs had no right to place the writs against goods in the Sheriff's hands with the mere object of getting a colourable return of no goods made to them, upon which to found the writs against lands: the statute intended that the return of no goods should be a *bonâ fide* one. It may be no injustice to a defendant to have it untruly made, for he may have consented to it; but even when he does consent, the other creditors of the defendant have the right to complain of the proceeding, for it operates to their delay and prejudice; and, if there be two defendants, the consent of one cannot authorize this course to be taken against the defendant who has not consented. *Oswald* v. *Rykert*, 22 U. C. Q. B. 306.

Then the *alias* writs against goods and the writs against lands cannot be running at the same time; and if the plaintiffs withdraw the *alias* writs in time to anticipate this application, that will not avail them, because by so doing they cannot give effect to the writs against lands, which were concurrent; for they were improperly issued, and the subsequent withdrawal of the other writs will not cure the defect: they were both unwarranted when they were issued, and they are each of them unwarranted still. He referred to *Curry* v. *Turner*, 8 U. C. L. J. 296.

A. Wilson, J., delivered the judgment of the court.—

The questions are:

1st. Whether it was allowable to the Sheriff to return the three original writs of *fieri facias* against goods *nulla bona* in so short a time after he got them, at the request of the plaintiffs' attornies, and with the consent of one of the defendants, if the value of the goods of such defendant were very small in proportion to the amount of the debt, and if the property in these goods were believed to be claimed by another in privity with the defendant, and if it were believed the other defendant had no goods which could be applicable to such writs.

2nd. Whether, if such returns be good as against the defendants, the Bank of British North America, as the grantees of the defendant Hamilton's real estate, can impeach the writs against lands which were issued out upon the returns of *nulla bona* before mentioned.

3rd. Whether it was objectionable to sue out the concurrent writs of *fieri facias* against lands and *alias fieri facias* against goods above mentioned; and if so, whether the plaintiffs could elect to abandon the *alias* writs against goods, and retain in full force the writs against lands.

The statement of the first question is, I think, an answer to it. The defendant, who gave consent to the return of *no goods*, cannot complain; nor has either defendant any cause of complaint of the return that was made as to the other. Hamilton cannot complain, because Kerby had no goods in fact which could apply to these writs; and Kerby could not complain, because, it is alleged, the goods which are said to be Hamilton's are stated to be claimed by another under a title derived from Hamilton; and it is not at all reasonable that the plaintiffs should contest this claim, especially if the property be small, as it is represented to be, when there is a probability of getting payment from the lands of Hamilton without this difficulty, simply by delaying till the expiry of the period when by law the lands can be sold: *Dicas* v. *Warne*, 10 Bing. 341; *Knight* v. *Colsby*, 5 M. & W. 274.

From the passing of the Statute of Westminster the 2nd, by which lands first became liable to an execution against the judgment debtor, it has always been held, that under the *elegit* the Sheriff must first take the goods of the defendant before he can deliver the lands; and if the goods be sufficient to satisfy the debt, the lands shall not be extended: 2 Inst. 395: *The King* v. *Hopper*, 3 Pr. 40. And the like rule applies, that the goods of both defendants shall be exhausted, when there are two defendants, before the lands of either are touched.

One defendant has, therefore, an interest in the due execution of the writ against the goods,

of his co-defendant, as well as of himself before his lands shall be seized: he has such an interest, at any rate, if the like rule applies in this country, in enforcing a process against goods and lands, which applies in England; and there seems to be no reason why it should not be so, when our statute has made the very provision, in precise words, which had force in England only by the constructive and presumed intent of the statute.

But a writ against lands, issued before the return day against goods, is said only to be an irregularity, and not a void proceeding, so as to defeat the title of a purchaser of the land, who brought at Sheriff's sale: *Doe d. Spafford* v. *Brown;* and it cannot be that a return of "no goods" by the Sheriff, where there are goods, can be more than an irregularity to be complained of by the defendant or defendants, if the creditor be wrongfully abusing the process of the court, by going directly or by collusion against the lands, in place of first exhausting the goods: O. Bridgman, 474.

As to the second question, I think we are not now required to answer it; because, in the first place, the returns of no goods were not unreasonably, oppressively, or dishonestly made; and, in the second place, they were made for three weeks at least before the Bank of British North America acquired their title to the lands affected, at which time the lands were bound by the writs against them.

I am not certain that the heir at law, devisee or other person deriving title to lands from or through a deceased debtor, or any other person who might be so prejudiced, might not have the right to complain in some form or other, if a wrongful or collusive return of no goods were made, while there was sufficiency of goods, and his lands were taken under process to satisfy a debt, which the goods could and should have satisfied; just as the debtor, if living, could, on process against himself, complain in the like case.

As to the third question, I think it was objectionable, according to the authorities, to take out these concurrent writs: *Oswald* v. *Rykert.*

It would, perhaps, have been a more convenient method of proceeding on executions, to have had the one writ against goods and chattels and lands and tenements, with a direction to the sheriff to levy upon the goods and chattels, as in *elegits*, in the first place; and if there were no goods, or upon these being exhausted, to levy upon the lands, but not to sell them for twelve months after the seizure. This was what probably intended by the Imperial Parliament, in passing the 5 Geo. 11 ch. 7, when it declared, that real estates in the colonies should be assets for the satisfaction of debts by the like remedies as personal estates for the satisfaction of debts; it was, firstly, to subject lands to liability for debts, as personalty was; and then to simplify the remedy, by making one species of execution answer for all purposes, instead of adapting so many different species of writs, as *fieri facias, levari facias*, and *elegit*, which had to be pursued in England. For, at the present time, if there be five shillings' worth of goods, a creditor for a thousand pounds must go on and make that sum, before he can proceed against the lands; while the later execution creditors, by having their writs returned at once *nulla bona*, take precedence of him upon the lands; and every creditor must go through the routine, and add to the expense of suing out a writ against goods, although it is notorious that there are no goods to be levied upon.

I think that the plaintiffs, not having acted upon their writs against goods, could abandon them, and elect to go on upon the writs against lands: *Andrews* v. *Saunderson*, 1 H. & N. 725.

We think the rule should be discharged with costs:

Rule discharged with costs.

## PRACTICE COURT.

(*Reported by* R. A. Harrison, Esq., *Barrister-at-law.*)

### In the matter of the Arbitration between Fraser and Escott.

*Prosecution for selling liquor without a license—Not subject of compromise without leave of the court—Not subject of a reference—Award in part set aside.*

A prosecution for selling whiskey without a license cannot be compromised without the leave of the court, and therefore cannot form the subject of a reference to arbitration. Where, although the offence was not submitted, it was tried for the purpose of determining the liability of the parties as to costs, so much of the award as related to it was set aside.

[Practice Court, E. T., 1865.]

*Becker*, Q.C., for Escott, obtained a rule calling upon James J. Fraser to shew cause why the award made by John McMillan, E. V. Bothwell, and Archibald Clinies should not be set aside wholly or in part with costs, on the following grounds:—

1. If the award were made under the agreement set forth in the rule, then on the ground that Archibald Clinies, named only as an umpire, was called on by the arbitrators, and acted as an arbitrator before any disagreement between the other two arbitrators, there being no such disagreement.

2. If the award were made under the bond set forth in the rule, then the said Clinies was absent from the sittings of the arbitrators for one whole day, while the same was proceeding, and a number of witnesses being examined, and the said Clinies did not hear their evidence, nor take any part in the proceedings during the said day.

3. On the grounds that the information for selling whiskey without a license, or any evidence thereon, or appeal therefrom, or any costs thereof, could not be referred or awarded on.

4. That the award directed that Escott should pay $56, arbitrators fees, and $4 for a room, in all $60 as costs of the arbitration, without any power or provision therefor, either in the agreement or bond.

5. On the ground that the arbitrators have in the award directed Escott to pay the costs in certain suits without any taxation or settlement thereof by the proper taxing officer, and took upon themselves without knowledge or authority or any proper evidence to tax and settle and fix the amount of such costs.

6. On the ground that the award is uncertain as to both the items of such costs, $94 22 and $48 62, in not setting forth what suits the same

were in, the court, the style of the cause and the cause of action, and that the award is otherwise uncertain; and that in the meantime proceedings be stayed.

*Wells* shewed cause. He also moved absolute a rule for execution upon the award. As a preliminary objection he contended that the application was not properly supported. The affidavits which were relied on for the purpose of impeaching the award were sworn to on the 10th and 15th of May, while the submission was not made a rule of court until after that time, the 17th of May, and so there was no matter properly pending in court at the time when these affidavits were made. He further contended that the rule should have been intitutled in the "Practice Court" as well as in the Queen's Bench, and that the affidavits were not entitled in any cause while several causes were referred.

Then as to the merits.

To the first objection, it is no cause for impeaching the award that the third arbitrator has acted unnecessarily. *Bates* v. *Cooke*, 9 B. & C. 407.

Second, the arbitrator who was absent for the one day was the third arbitrator, but he was not to act unless the other two first disagreed, and they had not then disagreed; and he was not therefore entitled to act after that day; Barnes 57, *In re Morphett*, 2 D. & L. 967.

Third, although the information for selling whiskey without license was referred, the arbitrators only adjudicated upon the costs, which they might do; *Beeley* v. *Wingfield*, 11 East. 46; Russell on Arbitration, p. 16, last ed.

Fourth, adjudicating as to costs is at most only bad to that particular part.

Fifth, ground, Mr. Becher said he would not press.

Sixth, the costs awarded are sufficiently determined in amount; it was not necessary to do more.

*Becher*, Q.C., supported the rule.

First, if the third person acted jointly with the other two, when he should not, the act of the other two cannot be assumed to have been their act, for he may have influenced them.

Second, if he should have acted with them, his absence invalidated the award; *Plews* v. *Middleton*, 6 Q. B. 845; *Little* v. *Newton*, 9 Dow. 437; *Peterson* v. *Ayre*, 14 C. B. 665; *Martin* v. *Kergan*, 2 U. C. Prac. Rep. 370; *In re Beck & Jackson*, 1 C. B. N. S. 695; *Morgan* v. *Bolt*, 7 L. T. Rep. N. S. 671. And if he should have acted alone, as he ought to have done if the other two had disagreed; then joinder with them was improper; *Tollit* v. *Saunders*, 9 Price, 612; *Re Salkeld* v. *Slater*, 12 A. & E. 767.

Third, as to the proceedings for selling whiskey without license, the arbitration disposed of it as far as it could do so, while the criminal proceedings were still pending, and it was an illegal subject to adjudicate upon; *The Queen* v. *Blakemore*, 14 Q. B. 544; Russell on Awards 15 2nd ed.

Fourth and Fifth, as to the costs of reference, see *Firth* v. *Robinson*, 1 B. & C. 277.

Sixth, the costs were awarded upon an uncertainty, because the suits should have been fully identified.

The affidavits were rightly entitled—not in a cause, because the submission is not a proceeding in a cause, but includes a cause.

Adam Wilson, J.—The submission which has been made a rule of court, is dated the 31st March last. It recites a controversy and law suit between the parties, namely three actions brought by Fraser against Escott; an information laid by Fraser against Escott for selling whiskey without license; and also a suit to recover $200 for damaging the house and property that Escott rents of Fraser; also a writ of ejectment caused to be served on Escott, to eject him from the house and premises he rents before the expiration of the lease; also a writ of summons caused to be served on Fraser by Escott for damages accruing to the property of Escott by Fraser in not repairing the premises according to a verbal agreement, and in not giving possession of the house at the time specified in the agreement.

The reference was then made of the said controversy to John McMillan, E. V. Bothwell, and "if the two cannot agree, the third man is to be Mr. Archibald Clinies" or any two of them.

The parties agree to observe the award to be made by the said arbitrators or any two of them, and the award is to be made in writing under the hands of McMillan, Bothwell and Clinies or any two of them, ready to be delivered on the 11th of April next.

Besides this agreement there is a bond made the 31st of March, 1865, by Fraser, in the penal sum of £125 to Escott, with the condition that if Fraser shall submit to the decision and award of McMillan, Bothwell and Clinies as arbitrators, by and on behalf of Fraser and Escott, including all and all manner of actions, cause and causes of action, suits, controversies, claims and demands whatever, provided award be made by McMillan, Bodwell and Clinnies or any two of them, ready to be delivered on or before 11th of April, 1865, &c.

On the back of this bond is endorsed a memorandum under the hands and seals of Fraser and Escott, dated 7th April 1865, extending the time for making the award until the 20th of April.

The award is dated the 19th of April, and is under the hands and seals of all three arbitrators. It recites the mutual bonds of the parties dated the 31st of March last. The three then award:

First, that Escott shall on or before the 1st of May, 1865, deliver up to Fraser the house he rents from Fraser.

Second, that Escott shall pay Fraser on or before the 1st of May, $239 59, being for costs incurred by Fraser in the suit entered against Escott for selling whiskey without license, which charge the arbitrators consider sustained by the evidence before them. For damages to the premises of Fraser, occupied by Escott, $54. For costs incurred by Fraser in the suit against Escott for damages, $94 22. And for costs incurred by Fraser in the suit against Escott to eject Escott from the said premises, $48 62. And for rent up to the time fixed by this award for Escott to leave the premises, $40; less $2 due to Escott by Fraser and $3 25 incurred by Escott caused by an unjustifiable issue of a landlord's warrant by Fraser, $34 75. And the

same shall be in full of all monies owing by Escott upon any account whatever. That in the suit of Escott against Fraser, each party shall pay his own costs. That each of the parties shall pay his own witnesses on the arbitration, and that the other costs of the arbitration, $60, shall be paid by Escott, being for arbitrators fees, $56, and for room, $4. And that the parties shall within 15 days next ensuing the date of the award, execute releases one to the other.

Escott swears that on the first day of the arbitration Clinies did not attend the arbitration, notwithstanding which the other two arbitrators proceeded and examined a number of witnesses. Fraser swears this was so, but that when Clinies came he was shown the whole of the evidence taken, and read it.

It appears the arbitration lasted four days after this, being five days altogether, and that Escott was present, as I gather, during the whole time and probably at this very time and occasion, and although he remonstrated fully against other things, he never made any objection to this.

The second objection then I cannot now entertain. The sixth objection has nothing in it. The fifth objection was not pressed. The first objection is of no weight, because the submission taken in connection with the bond was, I think, to the three arbitrators or any two of them. All three therefore had the right to participate. The fourth objection as to costs is only entitled to prevail as to the particular portion. This leaves the third objection only remaining to be considered.

As to the third objection, the charge or conviction for selling whiskey was not specially referred, the words are general, all and all manner of actions, &c., and the award is that Escott shall pay Fraser $8 for costs incurred in the suit entered by Fraser against Escott for selling whiskey without license, which charge the arbitrators consider sustained by the evidence before them. The affidavit shews that Escott was convicted of this offence by magistrates and fined $20 and costs, from which conviction he appealed to the Quarter Sessions; and it was while this appeal was pending and undetermined, and without the leave of court, that the arbitrators took it up and adjudicated upon it, as they unquestionably did.

By the Municipal Act, sec. 258, one half of the penalty goes to the informer and the other half to the municipality. And the question is whether this is an exercise of power beyond the authority of the arbitrators.

I have no doubt on this exposition of the law that a prosecution for selling whiskey without license cannot be compromised without the leave of the court, and therefore cannot form the subject of a reference to arbitration, because it is a matter of public concern and the prosecutor has no claim or interest in it for any private injury to himself, so that he could sustain an action against the party charged and recover damages. But the offence was not submitted although it certainly was tried for the purpose of determining the liability of the parties as to costs. If this could be done, the same might be done also as to the prosecutor's share of the penalty. But this would be manifestly against public policy, and so I think is the former, for it lessens the prosecutor's zeal in completing the prosecution which he has begun, and it is recompensing him for what he has begun but not completed.

This portion of the award I conceive to be separable from the rest, and as the defect appears on the face of the award itself, I may dispose of it without finally determining those formal and preliminary questions, which might have occupied me for some considerable time, perhaps not profitably, unless it can be said that every investigation of law must be presumed to be an interesting duty.

The rule moved on behalf of Escott will therefore be absolute, setting aside so much of the award as relates to the $8 costs of the prosecution and also as to the other item of $60 costs, and discharged as to the rest, but without costs on either side. And the rule moved on behalf of Fraser will be absolute, less the items before mentioned.

Rules accordingly.

## COMMON LAW CHAMBERS.

*(Reported by* ROBERT A. HARRISON, ESQ., *Barrister-at-Law.)*

### GORDON V. ROBINSON.

*Practice as to costs under the 22nd and 23rd rules of pleading T. T., 1856.*

[Chambers, Aug. 26, 1865.]

The defendant in this case having obtained leave to plead several matters on which issue had been joined, subsequently obtained leave to add another plea containing matter of defence that had arisen subsequent to the institution of the suit, the plaintiffs thereupon filed a replication confirming the truth of this plea, and praying judgment for costs. The master declined to tax the costs of suit, or to enter judgment, while the other issues remained undisposed of upon the record.

*J. A. Boyd*, for the plaintiff, applied in Chambers to have these issues struck out, and for directions to the master to tax the costs, as if there had been no such other issues.

*J. B. Read*, for the defendant, contended that they were entitled to the costs of pleading several matters, in the same way as if the issues upon all the pleas except the one confessed had been found in their favor.

A. WILSON, J., inclined to this view, and made an order that all the pleas, and the issues thereon, except the plea confessed upon the record, should be struck out, and that the costs of such pleas should be set off against the plaintiff's general costs of the cause, to be taxed upon entering up judgment. No costs of the application to either party.

### KERR V. CORNELL.

*Certiorari—Costs of application for same.*

[Chambers, Aug. 30, 1865.]

This cause was removed by *certiorari* from the Division Court into the Common Pleas, at the instance of the defendant, who succeeded in obtaining a verdict in the court above. On the

taxation of costs, preceding the entry of judgment, the master allowed to defendant, in addition to the full costs of defence, the costs of and incidental to the removal of the cause, although the order granting the writ was silent as to costs. The plaintiff thereupon obtained a summons calling upon defendant to show cause why the taxation should not be revised, on the ground, amongst others, that the costs of the removal had been improperly allowed to defendant.

*J. Sidney Smith* showed cause.

*Foster* supported the summons, citing *Reg.* v. *Summers*, 1 Salk. 55; *Reg.* v. *Papman*, 1 E. & B. 2; *Corley* v. *Roblin*, 5 U. C. L. J. 225; Marshall on Costs, 7.

Morrison, J.—The master reporting that in his opinion he ought not to have allowed the costs of the writ of *certiorari*, order granted.

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### Miller v. Nolan.

*Interpleader—Sale after claim made—Delay.*

Where notice of claim to certain goods seized by the sheriff was given on the 30th June, and the greater part of the goods were sold (as being perishable) by the sheriff on the 5th July, on an application for an interpleader order, made the 3rd August,

*Held*, that the sheriff was not justified, by the fact that the first seizure did not embrace all the goods of defendant, in delaying to apply till he could get possession of the residue.

[Chambers, Aug. 30, 1865.]

By a summons granted on the 3rd August, at the instance of the sheriff of the county of Frontenac, the claimant to certain goods seized by him and the plaintiff in the cause were called upon to state the nature and particulars of their respective claims, &c. The affidavits filed on both sides disclosed the following facts: Plaintiff gave his notice to the sheriff on the 30th June. As a portion of the property so seized was perishable, the sheriff proceeded to a sale on the 5th July.

The reason for not applying at once was thus stated: "My reason for not applying immediately for an interpleader order herein was as follows: I understood a portion of the defendant's property had been concealed or removed, and I was desirous, as this was part of the property claimed by the claimant, that the whole should be disposed of at the same time, without the necessity of making a second application; and since such sale I have discovered and have now under seizure in my possession a valuable mare; that as soon as I had discovered the said mare, being all the property which I thought it likely I might find, I instructed my attorney to apply for the usual interpleader order."

*J. S. Smith* for the sheriff.

*Foster*, for claimant, contended that the sheriff, having exercised his discretion (*Crump* v. *Day*, 4 C. B. 760) and parted with the possession of the goods (*Wheeler* v. *Murphy*, 1 U. C. Pr Rep. 336) after a claim had been made to them, was not in a position to ask for protection. That the claimant should not be forced to interplead for the proceeds of the sale of goods when he had claimed the goods themselves The hardship of having goods seized and sold for less than their value and receiving only the proceeds of the sale was a proper matter to be pressed before the judge (*Abbott* v. *Richards*, 15 M. & W. 194; *Booth* v. *Preston & B. Railway Co.* 3 U. C. Pr. Rep. 90). That the delay to apply was not satisfactorily accounted for (*Thompson* v. *Ward*, 1 U. C. Pr. Rep. 269; *Ridgway* v. *Fisher*, 8 Dow. 567; *Cook* v. *Allan*, 2 Dow. 11).

Adam Wilson, J.—The sheriff received the notice of claim on the 30th June, and sold part of the goods on the 5th of July, because, he says, the same were perishable. The rest, he says, he did not sell then. He does not say to what extent he sold or did not sell. The notice of claim shows the goods were not perishable, but even if so, I do not see what difference it would make, and the claimant says all the goods seized, but one mare, were sold many weeks ago. The sheriff's excuse for delay—for he does not apply till the 3rd August—is, that he had not seized all the goods, and he did not apply at his first seizure but was waiting till he could get the residue. This is no reason for his selling on the 5th July after the claim made. This was his own act, and he should bear it himself. Upon these grounds I discharge the summons with costs.

Summons discharged with costs.

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## ENGLISH REPORTS.

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### QUEEN'S BENCH

### Mainprice v. Westley.

*Principal and agent—Sale by auction—Peremptory sale—Liability of auctioneer—Reserve price.*

The mortgagee of certain premises instructed an auctioneer to offer them on a specified day by public auction for peremptory sale. A handbill was thereupon issued by the auctioneer, announcing the sale "by direction of the mortgagee," and also stating that further particulars might be obtained "from Mr. Hustwick, solicitor, or the auctioneer." At the sale the plaintiff made the highest bid, with the exception of Hustwick, who, acting for the vendor, outbid the plaintiff and bought in the property.

In an action brought against the auctioneer for refusing to sell the premises peremptorily, as advertised:—

*Held*, that, under the circumstances above mentioned, he was not liable.

[July 4, 1865.]

This was an action tried before Bramwell, B., at the Cambridgeshire Summer Assizes, 1864. The declaration stated that the defendant, being an auctioneer, was retained to sell by public auction a certain messuage, shop, and appurtenances, situated at Soham; and the defendant thereupon circulated certain handbills and other notices wherein it was stated and represented by him that he would offer the said messuage, &c., for *peremptory sale* on the 1st of April, 1864. And the plaintiff accordingly attended the sale, and the said messuage, &c, was offered for sale in pursuance of the said handbills, &c; and the plaintiff there and then bid the highest price for the said messuage, &c., except a certain price which was then and there, to the knowledge of the defendant, wrongfully and contrary to the terms whereon the said messuage, &c., were offered for sale, bid and offered by a certain agent on behalf of the vendor. Then followed the averment of performance of conditions precedent.

Breach—That the defendant, well knowing the premises, did not nor would not sell the said

messuage, &c., peremptorily, or accept the said offer and bid of the plaintiff, or declare the plaintiff to be the highest bidder and purchaser, whereby, &c.

The defendant pleaded not guilty, and traversed the various allegations of the declaration as to the circulation of the handbills, &c., and the breach. He also pleaded that "the said price bid and offered at the said sale by the said agent was not a price bid and offered contrary to the terms on which it was stated by the defendant as alleged, that the said messuage, &c., would be offered for sale."

Upon the trial it appeared that in March, 1864, the defendant caused certain handbills to be posted in Soham and its neighbourhood, announcing a dwelling-house, grocer's-shop, and beer-house at Soham, Cambridgeshire, for *peremptory* sale by auction, by direction of the mortgagee, on the 1st of April, 1865, at the Crown Inn, Soham. At the foot of the handbills were printed the following words: "For further particulars apply to Mr. Hustwick, solicitor, or the auctioneer."

On the evening of the sale the plaintiff attended the auction. At his request the conditions of sale were read by the agent of the vendor, and and in them it was stated that the "highest bidder should be the purchaser." No right of bidding was reserved to the vendor. The biddings slowly increased from £130 to £187, which was offered by the plaintiff, and no higher sum being mentioned, the defendant, who acted as auctioneer, inquired of the agent of the vendor (Mr. Hustwick) whether there was any reserve. He was told that there was, and that the sum was £195. There being no advance on this price, the property was accordingly knocked down to the vendor as unsold. The plaintiff almost immediately afterwards claimed the property of the defendant, but it was not delivered to him. He thereupon brought this action.

A verdict was entered for the plaintiff, subject to leave reserved to enter it for the defendant. A rule *nisi* was obtained accordingly in Michaelmas Term, 1864, by *O'Malley*, Q.C., calling on the plaintiff to show cause why the verdict should not be entered for the defendant, on the grounds that the plaintiff made out no cause of action, that the allegations of the declaration were not proved; that the breach was not proved; that on the facts proved the verdict should have been for the defendant, that there was no contract in writing to bind the defendant; or why judgment should not be arrested, on the ground that the declaration disclosed no cause of action.

*Lush*, Q.C., *Douglas Brown*, and *Markby* showed cause, and contended that at a *peremptory* sale the highest bidder was of necessity the purchaser.

*O'Malley*, Q.C., and *Keane*, Q.C., in support of the rule, contended that although the sale was advertised as *peremptory*, yet the vendor had a right at the auction to place a reserve price on his property.

The following cases were cited:—*Franklyn* v. *Lomond*, 4 C. B. 637; *Dingwall* v. *Edwards*, 12 W. R. 597; *Warlow* v. *Harrison*, 7 W. R. 188, 1 E. & E. 295; in error, 29 L. J. Q. B. 14; *Manser* v. *Back*, 6 Hare, 443; *Hanson* v. *Roberdeau*, Peake N. P. Rep. 163.

The judgment of the Court* was delivered by

BLACKBURN, J.—The declaration in this case contains averments that the defendant, being an auctioneer, retained to sell by public auction a house and shop, published and circulated handbills, in which it was stated and represented by the defendant that he, the defendant, would offer the said messuage and shop for peremptory sale by public auction on a day and at a place named: that the plaintiff, confiding in these statements and representations, attended at the time and place; and that the messuage was offered according to representations and statements, and the plaintiff then bid a price, which was the highest bid, except a sum which, to the knowledge of the defendant, was bidden by an agent on behalf of the vendor, contrary to the representation that the sale was peremptory; yet the defendant did not, nor would sell the messuage peremptorily, or accept the offer of the plaintiff, or declare the plaintiff the highest bidder and purchaser. There were pleas, amongst others, of "not guilty," and a denial that the defendant caused the handbills to be published and circulated as alleged. If it had been alleged that any part of this representation was false to the knowledge of the defendant, and that the plaintiff was induced by such deceit to incur expense by going to the place of action or the like, the count would have been good, and the plaintiff on proof of the deceit would have been entitled to such damages as he might have sustained by reason of expenses or loss of time occasioned by his attendance at the sale, or possibly to merely nominal damages. But intentional deceit is neither alleged nor was it attempted to be proved; what the plaintiff relied on was, that there was a contract on the part of the defendant that if the plaintiff was the highest bidder the premises should be knocked down to him, and if he had proved such a contract, the declaration would, probably, after verdict, be understood as alleging it, or at all events might easily be made to do so by an amendment. But we think that no such contract was proved.

It appeared on the trial that the defendant was an auctioneer, and that he had circulated handbills in which it was stated that the premises, on the day in question, would be offered for peremptory sale by auction, by Mr. J. Westley, the defendant, by direction of the mortgagee, with a power of sale subject to such conditions as would then be declared, and at the bottom of the bill was a statement in large capitals "for further particulars apply to Mr. Hustwick, solicitor, or the auctioneer." There is no doubt that this was a representation by the defendant that he intended to put up the premises for peremptory sale, but it also contained a statement that he did so by direction of the mortgagee and as agent for him, and though the name of that mortgagee is not disclosed on the bill, the name of the solicitor, Mr. Hustwick, is disclosed, and he is referred to as being the party from whom further particulars were to be obtained. These parts of the hand-bills very materially qualify the representation stated in the declaration, and it appeared that they were true. Hustwick was the solicitor of the vendor, and the representations were made by his authority, and the plain-

* Cockburn, C. J., Blackburn, J., Mellor, J., and Shee, J.

tiffs complaint was that Hustwick bought in the premises. If there was a contract on the part of the defendant that the sale should be peremptory, it was truly enough said that the contract was broken by allowing the property to be bought in.

The plaintiff's counsel, in the argument before us, mainly relied on the authority of the case of *Warlow* v. *Harrison*, where in the Exchequer Chamber three learned judges gave their opinion that where an auctioneer advertised a sale without reserve, not disclosing in any way who his principal was, he personally contracted that there should be a sale without reserve. Two other learned judges did not agree in this view, and it appears that ultimately the Court of Exchequer Chamber pronounced no other judgment than that the pleadings should be amended to enable the parties to raise the question, unless they consented to a *stet processus*, which they did. We do not think therefore that we are precluded by this as a judgment of a court of error, and, if necessary, we should be at liberty to consider the question whether even in a case where the name of a principal is not disclosed by an auctioneer there is a contract by the latter such as is now insisted on. The Lord Chief Justice and my brother Shee are of opinion that there is not, inasmuch as the character of an auctioneer as agent is unlike that of many other agents as to whom so long as the fact of their having a principal is undisclosed it remains uncertain whether the contracting party is acting as principal or agent; while in the employment and duty of an auctioneer, the character of agent is necessarily implied, and the party bidding at the auction knowingly deals with him as such, and with the knowledge that his authority may at any moment be put an end to by the principal; I myself should pause before deciding upon this ground. I do not, however, wish to express dissent from the view thus expressed, and we are all of opinion that it is unnecessary to decide this point. The three judges who formed the majority of the Court in *Warlow* v. *Harrison*, base their opinion entirely on the fact that the vendor was not disclosed—that he was a concealed principal; but in the present case the passages in the hand-bill (which are not set out in the declaration) showed that the defendant was acting for a principal, the mortgagee, who was described, and whose agent, Mr. Hustwick, was named. Now, as a general rule, where an agent acts for a named principal, the contract, if any, is *primâ facie* with the principal, not with the agent, and accordingly acting on this principle the Court of King's Bench, in *Evans* v. *Evans*, 8 A. & E. 132, decided that where premises were let by auction by the plaintiffs as auctioneers, but at the foot of the written conditions was written "approved by David Jones," the contract of letting was not with the plaintiffs as auctioneers, but with David Jones. Patteson, J., saying "on the document I can see no doubt, if the plaintiffs let for themselves why is David Jones' name added?" We think this an express authority, that, if there was any contract in this case it was with Hustwick, not with the defendant. We are not to be understood as deciding that the plaintiff could not have maintained this action against Hustwick, but merely that he has failed in proving any case against the defendant. The rule therefore must be absolute to enter the verdict for the defendant.

Rule absolute.

## UNITED STATES REPORTS.

### SUPREME COURT OF ERROR OF CONNECTICUT.

William Morris v. Delos Platt and Another.

*Assault authorising belief of design to take away life—Self-defence—Fire-arms.*

(Continued from page 307.)

But in that the court were mistaken. A man who is assailed, and under such circumstances as to authorize a reasonable belief that the assault is with design to take his life, or do him extreme bodily injury which may result in death, will be justified in the eye of the criminal law if he kill his assailant, and in an action of trespass if he unsuccessfully attempt to kill him, and he surviving brings his action, for the killing would have been lawful and of course the attempt lawful; and no man is liable in a civil suit or criminal prosecution for an injury lawfully inflicted in self-defence and upon an actual assailant. Doubtless the question whether the belief was reasonable or not, must, in either proceeding, be ultimately passed upon by a jury; and the assailed judges at the time, upon the force of the circumstances, when he forms and acts upon his belief, at the peril that a jury may think otherwise and hold him guilty. But, in the language of Judge Bronson, in the thoroughly considered case of *Shorter* v. *The People* (2 Comstock, 193), "he will not act at the peril of making that guilt, if appearances prove false, which would be innocence if they proved true." And such is the law as cited by Judge Swift (2 Swift Dig. 285), from *Selfridge's case*, and as held on a careful review of all the cases in *Shorter* v. *The People*, and in numerous other cases which may be found cited there, and in Bishop on Criminal Law (vol. 2, p. 561); and it is the law of the land. That part of the request of the defendant used the term "excusable," instead of "justifiable," in respect to the homicide, and the latter term would have been more accurate. But the import of the request is not materially varied by that, and we cannot intend that it influenced the decision of the court.

2. The plaintiff, in answer to the defence made, denied that he was an assailant, and claimed that he was a by-stander merely, and requested the court to charge the jury, in substance, that if they so found, he was entitled to recover, although they should also find the defendant to have been lawfully defending himself against his assailants, and the injury to the plaintiff accidental. That request of the plaintiff embodies the unqualified proposition that a man lawfully exercising the right of self-defence is liable to third persons for *any* and *all* unintentional, accidental injurious consequences which may happen to them, and the court so charged the jury. Although there are one or two old cases and some dicta which seem to sustain it, that proposition is not law.

It is well settled in this court that a man is not liable, in an action of trespass on the case, for any unintentional consequential injury resulting from a lawful act, where neither negligence nor folly can be imputed to him, and that the burden of proving the negligence or folly, where the act is lawful, is upon the plaintiff. *Burroughs* v. *Housatonic R. R. Co.*, 15 Conn. 124. Is the rule different in trespass, where the injury is the immediate and direct, though undesigned and accidental result of a lawful act?

In respect of this question there is some confusion in the books, arising from two causes. First, the decided cases directly involving the point are few, but the question has been very frequently adverted to by way of illustration or argument, in cases where the point was whether case or trespass was the appropriate form of action. Such, with a single exception, were all the cases which the plaintiff has cited on his brief from our own or other reports in which the dicta originated. In all that large class of cases the dicta are thus thrown out *obiter*, and assume the fact without determining it, that the party is liable in one or the other form of action. (See on this subject the remarks of Shaw, C. J., in *Brown* v. *Kendall*, 6 Cushing, 395.) And in the second place, accidents (cognizable in actions at law, and distinguished from those peculiarly regarded in equitable proceedings) resulting from lawful acts, differ in character, and the distinctions and the right use of terms to characterize them have not always been sufficiently appreciated or regarded. A careful attention to those distinctions and the authorities will, I think, enable us to determine the question in hand with entire satisfaction.

An accident is an event or occurrence which happens unexpectedly, from the uncontrollable operations of nature alone, and without human agency, as when a house is stricken and burned by lightning or blown down by tempest, or an event resulting undesignedly and unexpectedly from human agency alone, or from the joint operation of both; and a classification which will embrace all the cases of any authority may easily be made.

In the first class are all those which are *inevitable*, or absolutely unavoidable, because effected or influenced by the uncontrollable operations of nature; in the second class, those which result from human agency alone, but were *unavoidable under the circumstances;* and in the third class, those which were *avoidable* because the act was not called for by any duty or necessity, and the injury resulted from the want of that extraordinary care which the law reasonably requires of one doing such a lawful act, or because the accident was the result of actual negligence or folly, and might with reasonable care adapted to the exigency have been avoided. Thus, to illustrate, if A burn his own house, and thereby the house of B, he is liable to B for the injury; but if the house of A is burned by lightning, and thereby the house of B is burned, A is not liable: the accident belongs to the first class, and was strictly inevitable or absolutely unavoidable. And if A should kindle a fire in a long unused flue in his own house, which has become cracked without his knowledge, and the fire should communicate through the crack and burn his house, and thereby the house of B, the accident would be unavoidable under the circumstances, and belong to the second class. But if A, when he kindled the fire, had reason to suspect that the flue was cracked, and did not examine it, and so was guilty of negligence, or knew that it was cracked and might endanger his house and that of B, and so was guilty of folly, he would be liable, although the act of kindling the fire was a lawful one, and he did not expect or intend that the fire should communicate.

And so, to apply these principles to this case, if the defendant had been in the act of firing the pistol at an assailant in lawful self-defence, and a flash of lightning had blinded him at the instant and diverted his aim, or an earthquake had shaken him and produced the same result; or if his aim was perfect, but a sudden violent puff of wind had diverted it or the ball after it passed from the pistol; and in either case the ball, by reason of the diversion, had hit the plaintiff, the accident would have been so affected in part by the uncontrollable and unexpected operations of nature as to be inevitable or absolutely unavoidable; and there is no principle or authority which would authorize a recovery by the plaintiff.

And, in the second place, if, while in the act of firing the pistol lawfully at an assailant, the defendant was stricken, or the pistol seized or stricken by another assailant, so that its aim was unexpectedly and uncontrollably diverted towards the plaintiff; or if, while in the act of firing with a correct aim, the assailant suddenly and unexpectedly stepped aside, and the ball passing over the spot hit the plaintiff, who till then was invisible and his presence unknown to the defendant; or if the pistol was fired in other respects with all the care which the exigencies of the case required or the circumstances permitted, the accident was what has been correctly termed "unavoidable under the circumstances," and whether the defendant should in such case be holden liable or not is the question we have in hand. For, in the third place, if the act of firing the pistol was not lawful, or was an act which the defendant was not required by any necessity or duty to perform, and was attended with possible danger to third persons, which required of him more than ordinary circumspection and care, as if he had been firing at a mark merely; or if the act, though strictly lawful and necessary, was done with wantonness, negligence or folly, then, although the wounding was unintentional and accidental, it is conceded, and undoubtedly true, that the defendant would be liable.

In this case the rule of law claimed by the plaintiff, and given by the court to the jury, authorized them to find a verdict for the plaintiff if they found the accident to belong to the second class, and to have been "unavoidable under the circumstances." We have seen that if the injury had been consequential, and the form of action case, the defendant would not have been liable, and the question returns, whether he can and should be holden liable because the injury was direct and immediate, and the form of action is trespass. I think not, whether the decision of the question be made upon principle or governed by authority.

If the question is to be settled upon principle, it seems very clear that the form of the action

should not be regarded, for the liability of the defendant must be determined by the nature of the accident, whether avoidable or unavoidable under the circumstances, or inevitable, and not by the fact that the injury was direct or consequential. The *foundation* of that liability in every case of accident, where it is the result of human agency influenced by the operations of nature, and the act is lawful, is really *negligence*. This is true of collisions between vessels on the water, or horses or vehicles and persons upon the land, which constitute the largest class of cases; for, as the accidents result from steering or driving, and are therefore direct injuries, trespass is the only remedy. So when a man, in firing at a mark, unintentionally wounds another, the injury is direct, and the form of action is trespass, but the ground of liability is negligence in doing an unnecessary and avoidable though lawful act, without that extraordinary degree of care which the law demands in such circumstances, and which would have prevented the accident As, therefore, the foundation of the liability is the same in both cases, irrespective and independent of the question whether the injury was direct or consequential, there is no reason for any distinction in respect to the justification in the two actions.

And to that effect is the current of authority. In England the dicta cited from Raymond were disregarded by a majority of the court in *Scott* v. *Shepherd*, although urged by Blackstone, J., who dissented, and the *decision* is in point for the defendant. No case in point for the plaintiff is cited upon his brief. The case of *James* v. *Campbell*, 5 Car. & P. 372, is not so, for in that case Campbell the defendant and another were fighting unlawfully, and in breach of the peace, and while thus fighting and attempting to hit his antagonist, Campbell hit the plaintiff, who was a by-stander. But there the act was every way avoidable.

Mr. Hilliard, in his work on Torts, vol. 1, c. 5, sec. 9, so states the law, and cites the English case of *Wakeman* v. *Robinson*, 1 Bingham, 213, and the case fully sustains him. The action was *trespass*, for driving against the horse of the plaintiff, and the rule of law recognised by the court as applicable to the action is stated in the head-note thus: "If one does an injury by unavoidable accident an action does not lie, *aliter* if any blame attaches to him though he be innocent of any intention to injure." If there be any later case overruling that, it has not been pointed out to us, or fallen under our observation. As late as 1860, and in the tenth edition of Roscoe's Digest of the Law of Evidence at *Nisi Prius*, that case is cited as law.

In this country, though the cases are few, they are all, so far as we are informed, with the defendant. In the case of *Vincent* v. *Stinchour*, 7 Verm. R. 62, which was an action of trespass against the defendant for driving a horse and sulkey against the plaintiff, the defendant claimed that the accident was unavoidable under the circumstances, for that his horse became ungovernable, and the injury could not be prevented by prudence and care, and the Supreme Court in an elaborate opinion held that a defence. In *Brown* v. *Kendall*, 6 Cushing, 292, which was an action of assault and battery, the defendant accidentally hit the plaintiff, a by-stander, while raising a stick to strike and part two dogs which were fighting. This was the precise case put for the purpose of illustration by some of the English judges, as cited on the brief of the plaintiff's counsel. Yet the court in Massachusetts, Chief Justice Shaw giving the opinion, held that the defendant was not liable "unless the act was done in the want of the exercise of due care, adapted to the exigency of the case, and therefore such want of due care became part of the plaintiff's case, and the burden of proof was on the plaintiff to establish it." The same principles are recognised by the Supreme Court of the State of New York, in the case of *Bullock* v. *Babcock*, 3 Wend. 391, although they were not applied because that was a case of avoidable accident, the injury having been inflicted by an arrow, while shooting at a mark without reasonable care. And it is sufficient to add that the case of *Vincent* v. *Stinchour* was cited by Judge Williams, in giving the opinion in *Burroughs* v. *Housatonic R. R. Co.*, 15 Conn. 131, with evident approbation, although, as the case did not call for it, the principle involved was not in terms adopted. But the broad proposition subsequently stated without qualification in respect to the form of action, that "where there is neither negligence nor folly in doing a lawful act, the party cannot be chargeable with the consequences," tends to show the inclination of his mind, and we cannot doubt that if the case had required it, the rule as settled in *Vincent* v. *Stinchour* would have been adopted by the court.

Such are the general rules of law applicable to accidental injuries by which we must be governed in deciding the question as raised on the motion. But we are not insensible to the fact that the danger of accidental injury to third persons from the use of firearms, even in lawful self-defence, is comparatively very great; that the bearing of these arms is becoming needlessly general, and their use in populous places and thoroughfares quite too frequent; and that some further protection to the public from injury by them seems necessary. That protection might be afforded by us, perhaps, if we should hold, first, the use of firearms, even in lawful self-defence, to be attended by so much contingent danger to innocent third persons, that accidental injuries by them should be deemed exceptional and wholly inexcusable as matter of law, or inexcusable unless the defendant should show that they were inevitable or absolutely unavoidable; or, second, that *all* such injuries should be deemed *primâ facie* negligent, and that it should be left to the jury to say whether in the particular case the danger of injury to third persons was so slight and improbable that the case was exceptional, and the defendant wholly free from blame, either in having or using the instrument. It is obvious, however, that if we should thus introduce an exception into the law to meet new contingencies, we should be going beyond the exigencies of this case (there being other errors), and encroaching upon the peculiar duties of the legislative branch of the government; and to that branch, with this statement of the condition of the common law, and suggestion in respect to the importance of a remedy, we must leave the matter.—*American Law Register.*

(*Note by Editor.*)

This case may be regarded as important upon both points raised and decided, although in regard to the first question there is little ground of doubt.

1. The very necessity of the case, in self-defence, presupposes that the party must be permitted to act upon appearances; but if he acts rashly or negligently, he is responsible for consequences, as well to the party whom he mistook for an assailant, as to all others accidentally damaged by reason of the rash or negligent attack on his own part. This is declared in *Levett's Case*, cited in *Cook's Case*, Cro. Car. 537, 538, where the master of the house, supposing his house attacked in the night time by burglars, rushed down stairs with his drawn rapier, and seeing the glimpse of a servant girl of one of the neighbors, whom one of his own servants had secreted in the buttery, and mistaking her for a burglar, thrust her through the body, by which she died immediately, and was held guilty of no crime. And the same was maintained in an early case, where the gamekeeper shot the owner of the preserve, mistaking him for a deer-stealer, and it was held excusable homicide. The same doctrine has always been maintained in the English courts, and is the established rule in America: *State* v. *Scott*, 4 Iredell (N. C.) 409; *Stewart* v. *The State of Ohio*, 1 McCook, 66; *Oliver* v. *State of Alabama*, 17 Alabama, 587. This rule of the common law is too well established to admit of question. In cases where life is concerned, there is no doubt it should be held under severe restraint, and especially where firearms are resorted to. But we do not perceive any safer rule than that of the common law, that the party be allowed to act, and to carry the action to the extreme limit of taking life, where he, upon just grounds, earnestly believes his own life to be in peril, and there is no way of escape open to him. And the rule will equally apply where he is under the same apprehensions of grievous bodily harm, for the law does not require men to incur such peril of life or limb, looking to the law for redress. In all such emergencies the primary laws of nature revive, as against the outlaw; and one who puts himself in the place, or presents himself in the guise of an outlaw, or a murderer, or burglar, must be content to be treated according to his apparent character. This is not a point, at the present day, open to much discussion.

2. The other case decided in the question might seem, at first view, more doubtful; but we believe it will be found, upon careful analysis, equally free from doubt. The question here is not, as in *Leame* v. *Bray*, 3 East. 593, and that numerous class of cases, whether the action shall be trespass or case, but whether any action will lie for an accidental injury or damage resulting from a *lawful act*; for so long as the act itself is not lawful, there is no question the agent is legally responsible in some form for all the direct and natural consequences of his act. That was decided in the leading case of *Scott* v. *Shepherd*, 2 Black. 892; 1 Smith's Lead. Cas. 210. But the question in the principal case before us is, whether, if the act done in self-defence is done upon a justifiable excuse, and in a prudent and careful manner, the agent is responsible for any unforeseen and accidental consequence of the act, whether direct or indirect. It would seem there could be but slight doubt in regard to a proposition of this kind.

It is not whether the use of firearms is allowable in self-defence; that has been settled by common consent ever since their invention. It is much the same question as their use in war. Self-defence is war, private war; allowing the party to resume, as against an outlaw, or one who comes in the guise of an outlaw, the primitive rights of a state of nature, the ante-social state, and to repel force by force.

Neither is it the inquiry, whether firearms may be used in self-defence in the midst of a melee or street fight; for the law does not require a man to use one mode of self-defence on one occasion, and not upon others. He has a right to use all the means which "God and nature have put into his hands." It is the primitive war of natural forces, and he is not obliged to mete them out with a scrupulous regard to possible consequences to others. Others must be content to take their chance, as they do in regard to other legal acts, or as they do in regard to all accidental consequences where no one is in fault. If the law of self-defence requires qualification, in consequence of the more destructive character of the instruments of modern warfare, it should be done by the legislature, rather than by the courts.

This doctrine is very ably defended by Shaw, C. J., in *Brown* v. *Kendall*, 6 Cush. 292, and by Williams, C. J., in *Vincent* v. *Steinhour*, 7 Vt. 62. It is well said by Lawrence, J., in *Leame* v. *Bray*, *supra*, and, as applied to the present question, by Shaw, C. J., in *Brown* v. *Kendall*, *supra*, that if the agent is to be made responsible, he must be so to the full extent; and if death ensue, it will be manslaughter at the least. The result of this will be, that if, in self-defence, where one may kill his assailant, he should accidentally kill another, he would be liable to punishment for manslaughter. It is very obvious no such consequence could flow from a lawful act.

The late case of *Hummach* v. *White*, 9 Jur. N. S. 796, has some bearing upon the question before us. It was there held, that where one took a horse, purchased the day before, into a crowded street to train him, and the horse becoming restive rushed upon the sidewalk or pavement and killed a man rightfully there, there could be no action, civil or criminal, maintained against such rider or owner of the animal, without distinct affirmative proof of negligence on his part. The mere happening of the injury or damage is not evidence to be submitted to the jury; there must be some distinct affirmative evidence of negligence, to entitle the plaintiff to go to the jury. I. F. R.

## GENERAL CORRESPONDENCE.

To the Editors of the Law Journal.

*Necessity of an Admiralty Court.*

Gentlemen,—Having seen an excellent article in your September number under the head of "An Admiralty Court," and wishing to see the subject fully discussed by abler pens than mine, I have, hoping to draw them out, ven-

tured to say something on the subject, should you deem it worthy a place in your *Journal*.

The commercial marine is so thoroughly mixed up with trade that without this branch, ordinary commerce would be of little account, but so striking are the peculiarities of the former that it requires special laws to meet the various questions that arise out of it.

Navigation, accordiug to history, is of very ancient date. Old Captain Noah, I suppose, takes rank as the first navigator. The Greeks at the siege of Troy had a pretty large navy of war vessels; and Solomon, about one thousand years before the Christian era, had a fleet of ships capable of making a voyage of three years duration, manned principally by Tyrian sailors. This shews that at that early day navigation must have been brought to great perfection. We find also, according to Eusebius, that these ancient Phenician navigators boldly passed the Pillars of Hercules and discovered Great Britain: and we find from other writers that tin from Great Britain was a very early article of commerce.

The Rhodians, perhaps, were the first who found it necessary to have marine laws to regulate their maratime affairs, and actually established a code, some parts of which are embodied in modern admiralty law at the present day. Among these are the laws of Jettison and General Average. It would be too tedious even to glance at the history of the ancient maritime laws of Tyre, Crete, Persia, Greece, Macedonia, Egypt, Carthage, Rome, and others, suffice it to say, that the necessity for such has been increasingly felt, and every maritime state in the present day has its Admiralty Court, owing to the fact that common law does not apply to maritime causes.

It was set forth very clearly in the leading article of your September number, that it is hopeless to get an intelligent verdict in a marine cause from a jury of landsmen. I say this without any disparagement to them, because it is a subject with which they are not acquainted, and of which they can have no practical knowledge.

Suppose a case of collision: a lawyer fully determined to get a verdict for his client (the jury being composed of landsmen), will tell them that two vessels meeting on the lakes are just the same as two teams meeting in the road, and each must "gee off" according to law to pass in safety, that it is a simple case, it is quite clear, and they must give a verdict according to his directions. He will be careful not to remind the jury that there are no fences on each side of a ships' road, that vessels are crossing each other's track in all directions, or how far such large bodies should be apart when it is necessary to put them on their proper course to pass each other in safety; or that when a vessels lights are dim she will appear much farther off than she is, or be further off than she appears, if her lights are bright.

These are some of the points on which he will give the jury no information, and perhaps in some instances he cannot give them any, simply because he has not studied the subject. Thus the matter would be left in the dark.

I stated above that all modern maritime states have admiralty laws, I should have excepted Canada West and part of Canada East, for Montreal is as bad as ourselves. Although our lakes are fresh yet we have "great waters" in which to "do business," and a very extensive marine which requires the same laws for its regulations as does traffic by sea.

Our waters are now navigated by sea-going vessels, and thus we are connected with the outer world. For the last three years our ports have been regularly visited by vessels from Norway. There is also a regular line of vessels owned in Liverpool trading thence to the upper lakes, passing through our canals. Thus we become a maritime state in reality. Suppose a foreign vessel should collide with one of ours on these waters, our vessel with a valuable cargo being totally lost, the foreign vessel may proceed to sea, and although she may be altogether in fault, we have no law to stop her, nor has the owner of the lost vessel or cargo any means of getting redress in our courts by any existing law.

Another case presents itself to my mind. One of our most respectable shipbuilders stated to me, that on one occasion, a short time ago, he did some repairs to an American vessel owned in Chicago, when on her way to Ogdensburg. The captain promised to pay the bill on his way up, but when he returned he disputed the bill, said he could get the repairs done much cheaper in Chicago, and that he would not pay so large a sum. The shipbuilder knowing that he had no redress, and could not detain the vessel and enforce

General Correspondence.

payment, had to submit to a large reduction in the amount in order to get it settled, although the regular prices only were charged in the bill.

The want of an Admiralty Court is being felt more and more among us, and I am of opinion the people will not quietly submit much longer to be without one. The law of salvage is a dead letter among us, and bottomry is a thing not known, but it will not do to splice a piece of admiralty law on to our common law.

Admiralty law is said by some to be expensive. What law is not expensive? Cannot admiralty law be administered as cheap as other law? In England experts are appointed, two of whom I think form a court, before which small causes to the amount of fifty pounds sterling may be tried with small expense. This plan might be adopted in Canada and perhaps improved upon.

They have also a panel composed of merchants and shipowners, who are well posted in maritime affairs, from which, when an important cause comes up, a special jury may be selected to try it.

If admiralty law were not a benefit the maritime nations would expunge it from their respective codes; they do not expunge it, therefore it is a benefit.

I would like to see this subject thoroughly ventilated, or else I would not seek to occupy a place in your *Journal*.

Sheer Hulk.

Kingston, 26th Oct., 1865.

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[It is with much pleasure that we publish the above letter, not only because it shews that a deep interest is felt in this matter by those most concerned, but also because it is written by a practical man who well understands what is required to place our lake marine upon a proper footing. It is by a full discussion of the subject by such persons that we may expect to obtain that extension of our laws, and the adaptation of the laws of other countries, which will eventually, and so far as possible, provide for the protection not only of those who risk their capital in vessels, but also of the sailors and mechanics, without whom such vessels would be of little use. We shall return to the subject in our next issue.—Eds. L. J.]

To the Editors of the Law Journal.

Gentlemen,—Will you please give your views on the following query:

"Leave to file affidavits in support of County Court rule within one week from this date October 7th, otherwise rule then to expire."

No affidavits were filed until 14th.

It is contended that, by the County Court rules, the first day is inclusive, as also the seventh day; consequently the week expires on the 13th.

But on the other hand it is argued that the question is one of common sense, and cannot be decided by the County Court rules, which (152 sec.) simply decides a question of computation of time in such cases where the days are prescribed by the rules of practice, &c.: whereas in the case under consideration, the period referred to is one to be decided by opinion or precedent, and that the case of *Young* v. *Higgon*, 6 M. & W. 49, referred to in Archbold's Practice, page 145 (13th edit.), decides that "when time within a certain time of a particular period is allowed, &c., the first day is to be reckoned exclusively."

But, per contra, it is urged that if the filing was not too late on the 14th, then the party has one day more than the week. Had the leave been to file affidavits within one week *after* this date, then clearly the first day would have been exclusive; and this seems reasonable.

I am puzzled how to decide this; and as the question of computation of time is one generally of interest, perhaps you would give your views and enable me to have a better knowledge of the same hereafter.

Yours obediently,

A Law Student.

Guelph, Nov. 2, 1865.

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[We think that the affidavits might have been filed on the 14th. The words "within one week, &c.," we take to mean the same as within seven days from this date; and if so, the ordinary test of first day exclusive and last inclusive must be applied. How would it be if the order were *within one day*, &c. This could not mean that the affidavits should be filed on the same day as the order was made, that day must therefore be excluded, and if excluded in one case must be equally so in the other. See *Scott* v. *Dickson*, 1 U. C. Prac. R. 366.]—Eds. L. J.

## MONTHLY REPERTORY.

### BANKRUPTCY.

June 30.

Ex parte Caldwell. Re Strahan, Paul and Bates.

*Proof of debt by residuary legatees—Executor declining to act—Practice.*

Where the executor under the will of a creditor of a bankrupt firm, declines to make proof against the estate of the bankrupts, on the ground that he is ignorant of the circumstances under which the debt accrued, the court will allow proof by the residuary legatees under the writ, subject to a direction for payment of the dividend to the executor. (13 W. R. 952.)

### COMMON LAW.

L. C. Green v. Crockett. July 20

*Practice—Compromise of suit—Petition to confirm minutes agreed on by counsel.*

Where the terms of the compromise of a suit had been agreed on by counsel, and one of the parties afterwards repudiated the authority of his counsel and refused to be bound by the agreement, the Court refused, on the petition of the other party, to enforce the compromise, or to make a decree according to the proposed minutes. (13 W. R. 1052.)

Q. B. T. T., 1865.

Ontario Bank v. Muirhead et al.

*Writs against goods and lands—Right to issue concurrently—Practice—Right to move.*

A plaintiff cannot at the same time deliver to the same sheriff a writ against goods and another against lands, both to be acted upon.

The plaintiffs issued a writ against defendants' goods to the sheriff of W., which on the 22nd of April was returned *nulla bona*, with the consent of one of the defendants, and on that day *fi. fas.* against lands issued to the same and to other sheriffs, and an *alias fi. fa.* goods to the sheriff of W., on which latter writ he seized certain stock. A motion to set aside these writs was made on behalf of two of the defendants, and of the Bank of British North America, to whom they had given a mortgage of lands on the 17th of May, 1865—the objections being that there had been no proper issue and return of writs against goods and that the writs against land and goods were concurrent.

*Held*, that the return of *nulla bona*, if any of the defendants had goods, could be only an irregularity, against which the Bank could not move, nor the defendants who had consented to it; but

*Held*, also, that as the alias writ against goods issued on the same day as the writs against lands, and had been acted upon, the latter writs were illegal, and must be set aside.

*Held*, also, that the mortgage to the Bank could not have prevailed against the writs, which bound the lands from their receipt by the sheriff. (24 U. C. Q. B. 568.)

Q. B. T. T. 1865.

Lett v. The Commercial Bank of Canada.

*Married Women's Act, C. S. U. C. ch. 73—Construction of—Property purchased after marriage out of the wife's separate estate.*

In an interpleader issue the plaintiff, a married woman, claimed goods seized under an execution against her husband. It appeared that the property consisted of stock, farming implements, and growing crops, and was seized upon a farm on which she and her husband were living, and which had been devised by the plaintiff's father to trustees for her benefit, the rents to be payable to her for her separate use; and that most of it, except the crops, had been purchased by the husband at sales, but paid for by the claimant out of the rents of other lands devised in the same manner. She had been married before the 4th of May, 1859, without any settlement.

*Held*, in the absence of any evidence to the contrary, that the reasonable presumption was that the husband was tenant of the land, and if so the crops would be his.

2. As to the other property, that, apart from our statute, it would not be the claimant's merely because it had been purchased by money which belonged to her under the will.

3. That as to the statute, it should be construed as creating a settlement before marriage in the terms of the first and second sections; and if in this case the property was bought by the wife to enable her husband to carry on the farm for his own benefit and that of his wife and family, it would be liable to satisfy his debts.

In the County Court it was left for the jury to say whether the property claimed did not belong to the husband, he having reduced it into possession. *Held*, that this was an insufficient direction, and that their attention should have been drawn more explicitly to the effect of the statute, to the presumption arising from the husband being the head of the family, occupying and farming the land, to the use to which the property was put, and to the wife's apparent object in purchasing it.

*Quære*, if this had been trespass instead of an interpleader, whether the wife could have sued alone.

S. C., Cal. Hooper v. Wells et al. U. S.

*Liability of common carriers and forwarders.*

The liabilities of common carriers and forwarders, independent of any express stipulation in the contract, are entirely different.

The common carrier who undertakes to carry goods for hire is an insurer of the property intrusted to him, and is legally responsible for acts against which he cannot provide, from whatever cause arising; the acts of God and the public enemy alone excepted.

Forwarders are not insurers, but they are responsible for all injuries to property, while in their charge, resulting from negligence or misfeasance of themselves, their agents or employees.

Restrictions upon the common law liability of a common carrier, for his benefit, inserted in a receipt drawn up by himself and signed by him alone, for goods intrusted to him for transporta-

tion, are to be construed most strongly against the common carrier.

If a common carrier, who undertakes to transport goods, for hire, from one place to another, "and deliver to address," inserts a clause in a receipt signed by him alone, and given to the person intrusting him with the goods, stating that the carrier is "not to be responsible except as forwarder," this restrictive clause does not exempt the carrier from liability for loss of goods, occasioned by the carelessness or negligence of the employees on a steamboat owned and controlled by other parties than the carrier, but ordinarily used by him, in his business of carrier, as a means of conveyance. The managers and employees of the steamboat are, in legal contemplation, for the purpose of the transportation of such goods, the managers and employees of the carrier.

A receipt signed by a common carrier for goods entrusted to him for transportation for hire, which restricts his liability, will not be construed as exempting him from liability for loss occasioned by negligence in the agents he employs, unless the intention to thus exonerate him is expressed in the instrument in plain and unequivocal terms. (5 Amer. Law Reg. N. S. 17.)

## CHANCERY.

V. C. K. —— June 22.

Stewart v. The Great Western Railway Co. and Saunders.

*Railway company—Compensation for an injury—Equitable fraud.*

A tradesman and his wife were passengers by an excursion train to which an accident occurred, and they received injury and were attended by a surgeon, and two others employed by the company, and they accepted and signed a receipt for £15 as compensation, but subsequently brought an action for £1,700, to which the company pleaded not guilty, and set up the receipt. The plaintiffs then filed a bill alleging a fraud, by which they were induced to accept the £15, and asking a declaration that, under the circumstances, the payment was not a full compensation, and to restrain the company from relying on the plea of the receipt. A demurrer to this bill overruled. (13 W. R. 886.)

And it was held, on appeal, that although the adoption by the company of the act of their agent would enable the plaintiff to resist their plea at law, yet the plaintiff was entitled to the interference of a court of equity; and that it was no objection to his bill that he did not ask for compensation in equity. (*Ib.* 907.)

Ch., N. J. Brewer v. Norcross. U. S.

*Set-off—Debts accruing in different rights.*

Bill filed by one partner against his copartner for an account of the partnership transactions. Defendant by his answer claims that there are moneys due him from complainant and from complainant and a third party on various accounts; he asks also a settlement of these accounts, and that the amount found due him may be allowed by way of set-off to the demand of the complainant. On exceptions to this answer it was *held*, that these matters having a connection with the subject-matter of the bill but being entirely distinct and unconnected, could not be set off against complainant's demand.

The general rule in equity as well as at law is, that joint and separate debts, and debts accruing in different rights cannot be set off against each other. Courts of equity, however, exercise a jurisdiction in matters of set-off independent of the statutes upon the subject. Whenever it is necessary to effect a clear equity, or to prevent irremediable injustice, the set-off will be allowed though the debts are not mutual.

When the interference of the court is asked because the defendant believes that the business was of such a character that justice requires that all the accounts should be inquired into and settled at the same time, the answer must allege some fact, which shows such belief of the defendant to be well founded. Nor can defendant have such relief by way of answer. He must file a cross-bill. (5 Amer. Law Reg. N. S. 63.)

## APPOINTMENTS TO OFFICE.

NOTARIES PUBLIC.

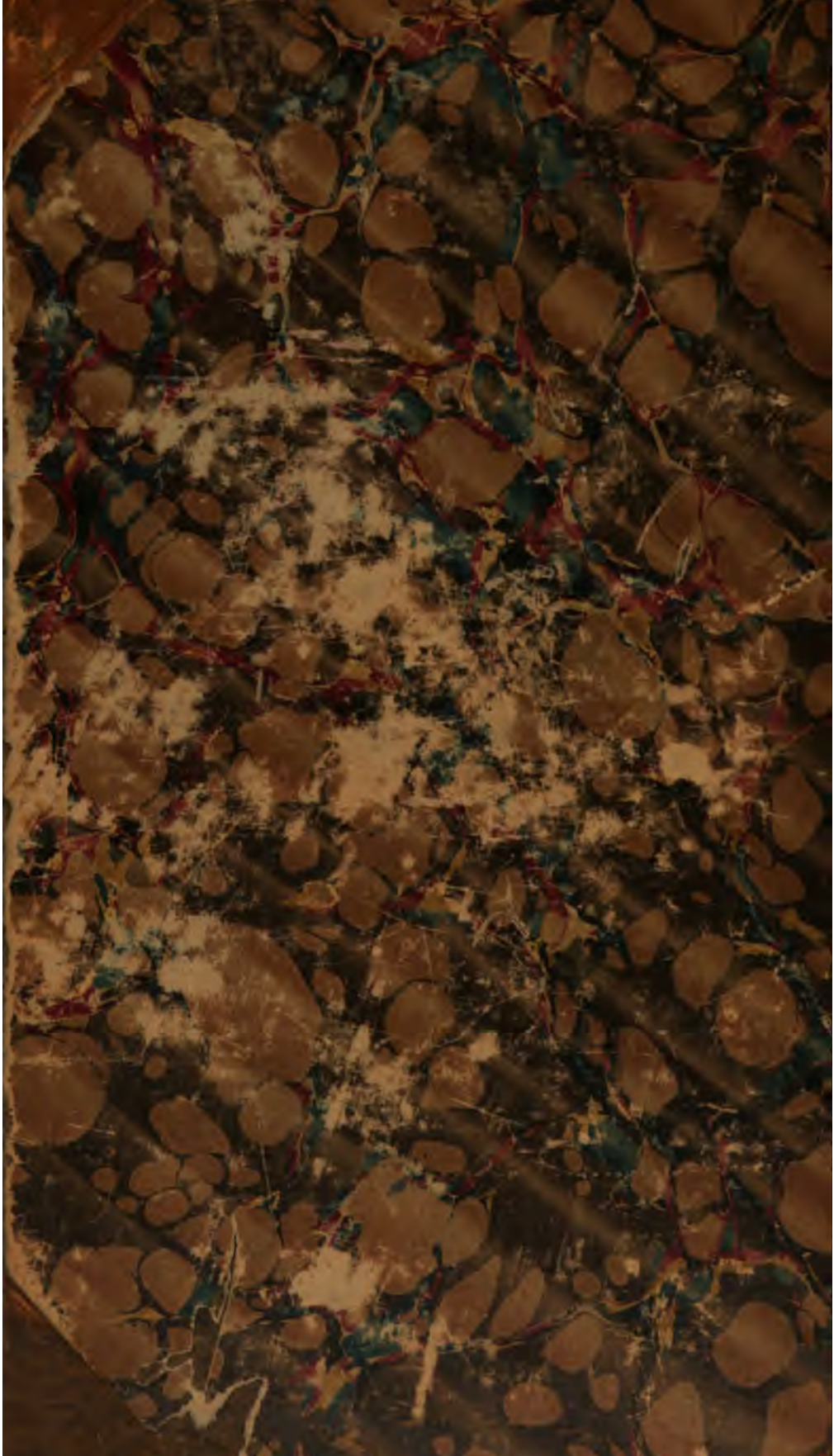
JOHN TWIGG, Esq., and PATRICK JOSEPH BUCKLEY, Esq., LL.B., Attorney-at-Law, to be Notaries Public for Upper Canada. (Gazetted Nov. 18, 1865.)

## TO CORRESPONDENTS.

"Sewer Hulk"—"A Law Student"—Under "General Correspondence."

H. McM., thanks for report—will appear as soon as possible

Few men are bold enough to fight a great railway company on any question, and especially on one involving only a small amount, and one result of this has been that railways have been virtually exempt from the penalties attaching to breaches of contract made by undue delay in the arrival of trains as advertised in the published time tables. It has long been settled law that, unless special damage can be proved, the company is not liable for mere delay, but wherever, in consequence of delay, expenses are incurred, there is every ground for making the company liable.

Mr. Best, a commercial traveller, recently brought an action in the Bloomsbury County Court against the London and North-Western Railway Company, to recover the sum of five guineas for expenses incurred by him in consequence of his detention while travelling on their line. The company, on their part, said they expressly stipulated that they did not guarantee the times stated for the arrival and departure of the trains, and that on the days in question they conveyed a very large number of excursionists at a cheap rate, which interfered with the punctuality of their ordinary trains. Mr. Lefroy, the judge, said that this statement did not protect them, except in cases in which an accident, or circumstances which could not be anticipated, came in the way; that if persons made their arrangements on the faith of the time-tables, and the company departed from them, they were answerable for losses sustained by the passengers.—*Solicitors' Journal.*

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